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2018 MIDWINTER MEETING REPORT OF 2017 CASES

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CHAPTER 1.

HISTORY, STRUCTURE, AND ADMINISTRATION OF THE FMLA

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III. Provisions of the FMLA

***Gourdaeu v. City of Newton*, 238 F. Supp. 3d 179 (D. Mass. 2017)**

Employee brought an action against her former employer, defendants Newton Police Department and the City of Newton, for retaliation in violation of the FMLA. After a three day trial, the jury returned a verdict for employer.

After employee took leave under the FMLA, she applied for a temporary position that was offered to internal staff members, but she did not get the job. She alleged that employer did not select her in retaliation for her taking FMLA-protected leave. The issue before the court was whether the legal causation standard for an FMLA retaliation case was the “but-for” test. The court concluded that the “but-for” test was the appropriate causation standard for FMLA retaliation cases.

Employee failed to show that she would have gotten the temporary position but-for her taking FMLA-protected leave. Even under the less stringent test, she failed to show that employer had used her FMLA-protected sick leave only as a negative factor in reviewing her application for the temporary position.

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Summarized elsewhere:
***Gourdaeu v. City of Newton*, 238 F. Supp. 3d 179 (D. Mass. 2017)**

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CHAPTER 2.

COVERAGE OF EMPLOYERS

I. Overview

II. Private Sector Employers

A. Basic Coverage Standard

***Strulson v. Chegg, Inc.*, No. 3:15-CV-00828, 2017 WL 6003085 (W.D. Ky. Dec. 4, 2017)**

Employer sought to dismiss employee's FMLA interference and retaliation claims. United States District Judge David Hale granted its motion to dismiss. Employee filed a motion to reconsider, which came before the court of United States District Judge Thomas B. Russell. Employee worked as a warehouse manager for employer. In September 2013, employee was diagnosed with lung cancer and took FMLA leave for surgery followed by chemotherapy. During her leave, employee expressed concern to an employee in the human resources department that she might be terminated due to her FMLA leave. Her coworker responded that it was very expensive for the company to have employees with cancer. When employee returned from leave, she was unable to walk very well and used a golf cart to get around the warehouse. Employer changed her position from warehouse manager to projects manager, and filled the warehouse manager position with an employee with less seniority but no health issues. Employee had a CT scan, and an irregularity was discovered in her other lung. She told her boss, and was terminated the next day under the pretext of alleged unprofessional behavior, for hiring an ex-felon to perform maintenance. Employee filed suit, and her FMLA claims were dismissed.

Judge Hale dismissed her interference claim, ruling that the complaint lacked facts sufficient to allege employee had a serious health condition and facts sufficient to allege employer was covered under the FMLA. Judge Russell ruled that her interference claim ought to be reinstated. "Plaintiff's detailed factual section regarding her lung cancer, the surgery to remove the nodule, the resulting chemotherapy, and the weekly doctor appointments provides this Court with ample information to conclude that she has sufficiently alleged a 'serious health condition' as required under 29 C.F.R. § 825.113(a)." Regarding employee's purported failure to provide facts sufficient to allege employer was covered under the FMLA, Judge Russell stated that employee had offered a lengthy description of her FMLA history while employed by employer: she went on leave "under the Family and Medical Leave Act," she was "called into work for a meeting while on FMLA leave," she had contact with the human resources manager "while on FMLA leave," and she expressed concern that she would be terminated "due to her FMLA leave." Judge Hale dismissed employee's retaliation claim, ruling that the complaint lacked facts sufficient to allege employer was covered under the FMLA. Judge Russell ruled that her retaliation claim also ought to be reinstated.

***Carter v. Spirit Aerosystems, Inc.*, No. 16-1350-EFM-GEB, 2017 WL 5270428 (D. Kan. Nov. 13, 2017)**

On September 9, 2016, employee brought an action against employer Spirit Aerosystems, Inc. ("Spirit") for violating the Americans with Disabilities Act. On June 21, 2017, employee filed an amended complaint, adding additional claims, including an FMLA interference claim, and adding three additional defendants, including Foulston Siefkin LLP ("Foulston"), the law firm that was representing Spirit. Foulston filed a motion to dismiss. To support his FMLA interference claim against Foulston, employee pointed to a Department of Labor ("DOL") investigative report, where the DOL investigator wrote that a Foulston attorney had said "*they* [Foulston] would start an interactive dialogue with Mr. Carter…[and] also stated *they* would recommend an earlier call-in time for Mr. Carter…." The Foulston attorney further stated "*she* would discuss the removal of Mr. Carter's [ ] write-up." Employee alleged that because the Foulston attorney personally participated in Spirit's employment decisions, she should be held liable as his employer. Foulston contended that it could not be held liable under the FMLA because it was not employee's employer. The court said that although the Tenth Circuit is silent on the matter of whether a law firm representing a company becomes an employer to the company's employees under the FMLA, many circuit courts "'have observed that the FMLA's definition of "employer" largely tracks the definition of "employer" used in the Fair Labor Standards Act ("FLSA") and have come to the reasoned conclusion that the standards used to evaluate "employers" under the FLSA should therefore be applied to govern the FMLA as well.' *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 422 (2d Cir. 2016) (some citations omitted) (citing *Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 667 F.3d 408, 417–18 (3d Cir. 2012); *Modica v. Taylor*, 465 F.3d 174, 186 (5th Cir. 2006); *Wascura v. Carver*, 169 F.3d 683, 685–86 (11th Cir. 1999))." Under the FLSA, relevant factors include if the party: (1) has the power to hire and fire employees; (2) supervises and controls employee work schedules or conditions of employment; (3) determines the rate and method of payment; and (4) maintains employment records. Although the definition of employer is to be broadly construed, the court said it did not construe it so broadly as to include Spirit's legal representatives. The court stated that the DOL report was created from investigator notes, which May not have reflected the Foulston attorney's actual word choices. But even if they had, Foulston did not have the power to hire or fire employees, did not maintain employee records, and did not determine employee's method of payment. The Foulston attorney's statement that she would "recommend an earlier call-in time for Mr. Carter," by itself, could not persuade the court that Foulston functioned as employee's employer. The courted granted Foulston's motion to dismiss.

***Breaux v. Bollinger Shipyards, LLC*, No. CV 16-2331, 2017 WL 1109566 (E.D. La. Mar. 23, 2017)**

Employee was employed as a welder by Bollinger Shipyards. Employee injured his hand and went out on a leave of absence. On his release, employee was seen by employer's doctor, Dr. Duet at Family Medical ("Medical Office"). Dr. Duet reported that employee was unfit to return to work, and employee was denied reinstatement and subsequently terminated. Employee sued Dr. Duet and Medical Office for FMLA interference on the grounds that he had not been reinstated as required under the FMLA.

Defendants filed a motion requesting the court dismiss employee's claims against Dr. Duet and Medical Office on the grounds that they were not employee's employers. In opposition, employee alleged that Dr. Duet and Medical Office qualified as employers under the

FMLA and the Fair Labor Standards Act ("FLSA") because they acted in the interest of employer. Employee also contended that Dr. Duet and Medical Office were liable under the FMLA's "integrated employers" test. The court rejected employee's arguments under both definitions. In reaching its decisions, the court noted that FLSA's and the FMLA's definitions of employer define an employer as any person who "*effectively dominates the employer corporation's administration or has the power to act on behalf of the corporation vis-à-vis its employees*." Applying this definition to Dr. Duet and the Medical Office, the court found that Dr. Duet and Medical Office simply offered their medical opinion about employee's fitness for duty, but neither had the power, nor acted on employer's behalf when it refused to reinstate employee.

The court also rejected employee's claim that employer, and Dr. Duet and Medical Office were "integrated employers." Separate entities May be considered part of a single employer if the relationship between the employers demonstrates: (1) they share common management; (2) there is an interrelation between the employers' operations; (3) the employers centralize control over their labor relations; and (4) the employers share a degree of common ownership and financial control. Applying these factors to the relationship between employer, and Dr. Duet and Medical Office, the court ruled that employee had failed to show the interrelation, common ownership, or control between these employers. Accordingly, the court dismissed employee's claims against all defendants.

***Mousseau v. Bollinger Shipyards LLC,* No. CV 16-1287, 2017 WL 1091249 (E.D. La. Mar. 23, 2017)**

Employee was employed by defendant Bollinger. She went out on an FMLA leave and was later released by her doctor without restrictions. Before she was permitted to return to work, employee was examined by employer's medical nurse at Family Medical, who released employee to work with restrictions. Employee asked to speak to Dr. Darren Duet ("Dr. Duet") the director of Family Medical, but he refused her request. Employee was not reinstated to work and employee filed FMLA claims against Family Medical, the nurse, Dr. Duet ("the parties"), and employer.

Employee alleges the parties constituted a "single employer" within the meaning of the FMLA and that employer and Family Medical functioned as an integrated employer under the meaning of the FMLA's "*integrated test*." Specifically, employee alleges employer and the three parties were a single employer within the meaning of the FMLA because they acted "directly or indirectly in the interest of a covered employer" pursuant to 29 C.F.R. § 825.104(a).

Defendants moved to dismiss employee's FMLA claims against the parties, except employer. The court found that employee had failed to provide any allegations demonstrating that the parties had directly or indirectly acted on behalf of the employer or "effectively dominated [defendant's] administration or had the power to act on behalf of the defendant vis-a - vis its employees" as further defined by the FLSA's substantially similar definition of employer.

The court also found that Family Medical and employer were not integrated employers. A determination of whether separate entities are an integrated employer is made by reviewing various factors, including: (1) common management, (2) interrelation between operations, (3) centralized control of labor relations, and (4) degree of common ownership/financial control, pursuant to 29 C.F.R. § 825.104(c)(2). Applying this test to Family Medical and employer, the

court found that employee failed to allege sufficient facts to determine whether employer and Family Medical constituted an integrated employer and dismissed employee's FMLA claims against the parties.

Summarized elsewhere:
***Bailey v. Reg'l Radio Grp. LLC*, No. 1:15-CV-375 (FJS/DJS), 2017 WL 1025948 (N.D.N.Y. Mar. 15, 2017)**

B. Who is Counted as an Employee

1. Location of Employment

2. Payroll Status

3. Independent Contractors

III. Public Employers

***Riley v. City of Kokomo*, No. 1:15-CV-391-WTL-DML, 2017 WL 897281 (S.D. Ind. Mar. 7, 2017)**

Court granted employer's motion for summary judgment as to employee's FMLA interference and retaliation claims where employer provided evidence that it employed less than 50 employees. Employee could not rely on the FMLA policy in employer's handbook where employee had repeatedly signed disclaimers indicating the handbook was not a contract. The court refused to consider employee's claims of promissory and equitable estoppel as they were not sufficiently developed in employee's brief.

A. Federal Government Subdivisions and Agencies

1. Coverage Under Title I

***Coulibaly v. Tillerson*, No. 14-0712 (RC), __ F. Supp. 3d __, 2017 WL 3732096 (D.D.C. Aug. 29, 2017)**

In 1999, Employee joined the Department of State's Foreign Service Instituted as a French instructor contractor. Later, in June 2011, he began a two-year Excepted Services appointment within the Department of State. Less than 12 months after his appointment began, employee was fired for "unacceptable conduct," including "inappropriate interactions with supervisors" and "failure to follow established procedures for requesting leave." In response, employee filed suit against the Secretary of State and fifteen other individuals who were current or former employees of the United States Department of State alleging that, by firing him, employers violated Title I of the FMLA. The parties filed cross-motions for summary judgment, and the court denied both motions.

The first issue was whether Title I of the FMLA, which allows for a private right of action, or Title II, which does not, applied to employee. The court held that employee was not covered by Title II because one requirement to be covered by Title II was that employee must have served in his position for at least 12 months, and there was no dispute that employee did not complete 12 months of service in his appointed position. The court then looked to whether

employee was eligible for leave under Title I of the FMLA, and explained that there was an issue of material fact under the economic reality test as to whether employee qualified was an "employee" of the Department of State.

The second issue was whether there was an issue of material of fact as to whether employers retaliated against employee after he exercised his FMLA-protected firsts. First, noting that the parties had not yet engaged in discovery, the court held that employers' motion should be denied because (1) employee provided evidence that his students gave him high remarks and discovery might show he was being held to a higher standard during his appointment than other professors, leading to the numerous disputes he had with his superiors; (2) a former colleague provided an affidavit saying that employee was "publicly humiliated and silenced" by his superiors during a meeting, which contradicted employers' assertion that employee interrupted that meeting and that was a part of employee's pattern of unacceptable conduct; and (3) employers admitted that employee's request for leave, which was initially deficient but which employee later tried to correct, was a factor in their decision to terminate his employment. On the other hand, the court denied employee's motion because the record was rife with evidence that employee did not get along with his superiors and did not meet their performance expectations. The court explained that employee had to show that the exercise of his FMLA rights was "the determinative factor" for his termination, and there were material disputes of fact on that issue.

2. Civil Service Employees

Summarized elsewhere:
***Schuman v. Perry*, No. 16-CV-313-JED-FHM, 2017 WL 2951918 (N.D. Okla. July 10, 2017)**

***Cruthirds v. Lacey*, No. 5:14-CV-00260-BR, 2017 WL 2242868 (E.D.N.C. May 22, 2017)**

3. Congressional and Judicial Employees

B. State and Local Governments and Agencies

***Colter v. Bowling Green-Warren Cnty. Reg'l Airport Bd.*, No. 1:17-CV-00118-JHM, 2017 WL 5490920 (W.D. Ky. Nov. 15, 2017)**

Employee filed claims for FMLA interference and disability discrimination against his employer (the airport), the City of Bowling Green, his supervisor, and Warren County. Employers filed a motion to dismiss, or, in the alternative, a motion for summary judgment.

Employee argued that the airport, the city, and the county were integrated employers for purposes of determining the number of employees at the airport. The district court held the integrated employer doctrine was inapplicable to public agencies. The court then followed the United States Court of Appeals for the Sixth Circuit's instructions directing courts to examine state law before referring to the Census of Governments. Although state law suggested that airport boards are intended to be separate entities from the cities and counties where they sit, the court declined to dismiss the case. It held that employee's affidavit claiming further discovery would give rise to facts related to the city and county's oversight of the airport was sufficient to warrant discovery.

The court granted the motion to dismiss the individual defendant, finding the FMLA's individual liability provision does not extend to public agencies. It also granted the county's motion to dismiss pursuant to the Eleventh Amendment, because counties are considered an arm of the Commonwealth pursuant to Kentucky law.

The court declined to dismiss the city from the case. The city argued it was immune under a state law preventing liability for the exercise of any judicial or legislative authority. The court determined the legislative acts at issue (e.g., funding allocation) were not the activities for which the city could be deemed liable. Rather, the potential liability was based on the FMLA and discrimination statutes at issue.

***Shultz v. Dixie State Univ.*, No. 2:16-CV-830 TS, 2017 WL 1968651 (D. Utah May 11, 2017)**

This case arises on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) before the United States District Court for the District of Utah. Employee worked for employer Dixie State University as its Vice President of Institutional Advancement from November 2005 until December 2014. Employee alleged violations of the FMLA, among other causes of action.

Employers argued that the state had immunity from employee's FMLA claims under the Eleventh Amendment. Employee agreed with employers' argument. The court dismissed employee's cause of action for violation of the FMLA without prejudice.

Summarized elsewhere:
***Minnis v. State of Wash.*, 675 F. App'x 728 (9th Cir. 2017)**

***Aguirre v. The State of Cal.*, No. 16-CV-05564-HSG, 2017 WL 5495953 (N.D. Cal. Nov. 16, 2017)**

***Pena-Barrero v. City of N.Y.*, No. 14-CV-9550 (VEC), 2017 WL 1194477 (S.D.N.Y. Mar. 30, 2017)**

IV. Integrated Employers

***Boles v. Spanish Oaks Hospice, Inc.*, No. CV416-323, 2017 WL 2222443 (S.D. Ga. May 19, 2017)**

Employee moved the court for leave to amend her FMLA complaint in which she asserted claims for retaliation and interference. Initially, employee sued an entity named Spanish Oaks Hospice, Inc. ("Spanish Oaks"), which did not employ the sufficient number of employees (minimum of 50) to trigger FMLA coverage. In her proposed amended complaint, employee sought to add five additional employers affiliated with Spanish Oaks under the theory of joint or integrated employers in order to aggregate the number of employees to meet the FMLA minimum of 50 employees. In addition, in the proposed amended complaint, employee sought to allege that Spanish Oaks was equitably estopped from asserting that it was not subject to FMLA because employee detrimentally relied on Spanish Oaks "representation that the conditions and benefits of her employment included application of the FMLA."

The court granted the motion for leave to amend. The court recognized that federal regulations (e.g., 29 C.F.R. § 825.104(c)) "permit the aggregation of employees of separate entities, for purposes of satisfying the FMLA minimum, if the entities constitute 'joint' or

'integrated' employers." Different entities May be "joint" employers if (1) they share employee's services, (2) one employer acts directly or indirectly in the interests of the other employer in relation to employee, or (3) where one employer controls, is controlled by, or is under common control with the other employer. Also, several entities are "integrated" employers where (1) they share common management, (2) there is interrelation between operations, (3) there is centralized control of labor relations, and (4) there is a degree of common ownership / financial control. The court held that the following allegations in the proposed amended complaint were sufficient to allege the theory of "joint" or "integrated" employer: a certain Kandi Lanier was an Executive Director of Spanish Oaks and that a certain Mike Johnson performs payroll and HR functions for the Spanish Oaks entities; identification of a common owner of the Spanish Oaks entities; the entities share the same website; some of the entities share the same phone number. On a side note, the court mentioned that there is authority holding that an employee seeking to assert "joint" or "integrated" employer theory must also show that the "economic realities" test is met (as it is applied to claims under the Fair Labor Standards Act).

With respect to Equitable Estoppel, the court noted that while the Eleventh Circuit has not decided whether equitable estoppels applies to FMLA coverage, other Circuits have recognized the application of Equitable Estoppel. Given the competing authority from other Circuits, the court allowed employee to plead that "Spanish Oaks is equitably estopped from contending that she is not FMLA eligible."

***Dunlap v. United Outstanding Physicians*, No. 15-CV-14022, 2017 WL 395237 (E.D. Mich. Jan. 30, 2017)**

Employee's son was diagnosed with leukemia and employee notified her employer she needed to take FMLA leave, seven or eight days later, employee's leave request was granted. Ten days after that, despite employer's FMLA policy and assurances employee's health insurance would continue in effect, employee's health insurance was terminated. Employee filed claims for FMLA interference and retaliation against three defendants. The three defendants included two companies who were virtually synonymous and connected health plans with physicians, and a third company that provided payroll and other services to the other two companies. Employee, unsure of who among three defendants was her employer, argued the three entities were "joint" or "integrated" employers. The Michigan district court considered evidence showing that the entities had some overlapping control of company finances and business operations and held a jury could disagree on whether defendant entities were joint or integrated employers. Defendants argued employee failed to establish defendants collectively had 50 or more employees, but the court noted defendants had the burden to show the absence of factual dispute and failed to establish they had less than 50 employees, failing to account for employees of various entities and leaving the issue unclear. Defendants also disputed that defendants terminated employee's health insurance or that her employment was terminated. However, an employee of defendants stated that while employee was on FMLA leave, the CEO of one defendant walked in and said employee's insurance was terminated and so was employee. The district court held a juror could reasonably infer defendants contributed to the termination of employee's health benefits. Given the factual disputes regarding whether defendants are covered employers, whether there are enough employees to entitle employee to leave, and whether defendants terminated employee's health insurance and employment, summary judgment was denied. Additionally, the district court denied summary judgment on the retaliation claim, because the close temporal proximity between the request for FMLA leave and the termination of health benefits and employment created a factual dispute about causation.

Summarized elsewhere:
***Colter v. Bowling Green-Warren Cnty. Reg'l Airport Bd.*, No. 1:17-CV-00118-JHM, 2017 WL 5490920 (W.D. Ky. Nov. 15, 2017)**

***Scott v. ProClaim Am., Inc.*, No. 14-CV-6003 (DRH) (ARL), 2017 WL 1208437 (E.D.N.Y. Mar. 31, 2017)**

***Breaux v. Bollinger Shipyards, LLC*, No. CV 16-2331, 2017 WL 1109566 (E.D. La. Mar. 23, 2017)**

***Mousseau v. Bollinger Shipyards LLC*, No. CV 16-1287, 2017 WL 1091249 (E.D. La. Mar. 23, 2017)**

V. Joint Employers

***Quintana v. City of Alexandria*, 692 F. App'x 122 (4th Cir. 2017)**

Monica Quintana ("Employee") was hired as a temporary employee of the City of Alexandria ("Employer"). Employer told her that she would become a permanent employee after her first anniversary. Approximately a year later, employer retained Randstad L.P. to handle the payroll function relative to employee's position and to handle some administrative functions. Employer then asserted that Randstad was employee's employer, despite employer having exclusive control over her hiring, firing, wages, work assignment, and working conditions. Employee did not enjoy employee benefits from either employer or Randstad. This continued for another two years. Employee's husband was hospitalized and in a coma. Employee asked her supervisor, a city employee, if she could have leave to take care of her husband. The supervisor told employee that she could take up to three months leave and not lose her job. No one from either employer or Randstad gave employee any forms to complete to qualify for her FMLA leave. For eight days, employee regularly notified employer about her husband's condition. On the eighth day, employer emailed employee, telling her that she was terminated because employer had not heard from her for a week. Employee sued both employer and Randstad for interference with and retaliation for her attempts to exercise her rights under FMLA. She pled alternatively that employer was the primary employer and that Randstad was secondary and vice versa. After settling with Randstad, employer filed a 12(b)(6) motion, which the underlying district court granted. The Fourth Circuit reversed.

The court of appeals reversed the district court and held that because employer exercised such control over employee's employment, employer could be held to be employee's primary employer. As such, employer had the responsibility to provide FMLA leave and to reinstate employee after the leave's end. The appellate court held that employer had liability even if it was employee's secondary employer because 29 U.S.C. section 2615(a)(1)-(2) provides that no employer, even a secondary one, can interfere or retaliate as to FMLA. Also, the appellate court held that the email firing employee provided sufficient facts to state a retaliation or discrimination claim under FMLA.

Summarized elsewhere:
***Boles v. Spanish Oaks Hospice, Inc.*, No. CV416-323, 2017 WL 2222443 (S.D. Ga. May 19, 2017)**

***Bradford v. Prosoft, LLC*, No. 3:16-CV-00373-CRS-DW, 2017 WL 1458201 (W.D. Ky. Apr. 24, 2017)**

***Boyed v. Dana Inc.*, No. 3:16CV2609, 2017 WL 1179058 (N.D. Ohio Mar. 30, 2017)**

***Dunlap v. United Outstanding Physicians*, No. 15-CV-14022, 2017 WL 395237 (E.D. Mich. Jan. 30, 2017)**

A. Test

***Meky v. Jetson Specialty Mktg. Servs., Inc.*, No. 16-CV-1020, 2017 WL 878235 (E.D. Pa. Mar. 6, 2017)**

Employee brought suit pursuant to 29 U.S.C. §§2601-2654 through which she claimed that her employer interfered with her rights under the Family Medical Leave Act and retaliated against her for exercising such rights. The case is before the court on employer's motion for summary judgment. The issues before the court were: (1) whether employee's time working for employer as a temporary employee through a third party temporary service provider should be counted towards her months and hours of service under a joint employer theory; (2) whether employer interfered with employee's rights under the FMLA when it did not provide her paperwork related to her rights; and (3) whether employer retaliated against employee when it discharged employee within an alleged seven days after employee requested FMLA leave. With regard to the joint employer claim, employer argued that it could not be a joint employer because employee worked for a separate and distinct entity and, thus, the two entities were not working directly or indirectly in the interest of one another. The court found the argument unpersuasive because 29 C.F.R. §825.106(a) specifically allows two separate entities to be joint employers. The court also noted that a joint employer relationship could exist where work "simultaneously benefits two or more employers." Also 29 C.F.R. §825.106(b)(1) specifically mentions that "joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer."

Employer then claimed that because employee ceased employment with the temporary service provider and became a regular employee of employer, the period of employment while a temporary employee should not count toward determining FMLA eligibility. The court found this argument unpersuasive as well because under the FMLA, a joint employer relationship May exist when: (1) an arrangement exists to share the services of an employee; (2) where, directly or indirectly, one employer acts in the interest of the other employer in relation to employee; or (3) where two employers May be deemed to share control of employee, directly or indirectly, because of direct or common control of one employer by the other. The court found that all three existed with respect to employer because the supplier and employer entered into a comprehensive staffing arrangement and the supplier shared an account manager with employer at no extra cost to help reduce employer's administrative burden. The account manager also regularly discussed operations and production schedules with employer. The account manager also exercised daily control over the temporary workforce. Thus, all three elements applied, the court found. Since 29 C.F.R. §825.106(d) provides that "[e]mployees jointly employed by two employers must be counted by both employers…in determining employer coverage and eligibility," the change in employment status does not restart the employment clock.

The court did grant employer's motion for summary judgment with respect to the claim that employer did not provide notification of FMLA rights to employee because it found that employee did take the time off she was seeking and did not lose any monetary or other benefits as of the result of the failure to notify. The court found that the loss of monetary and other benefits was due to the termination of employment.

The court denied the motion for summary judgment with respect to the retaliation claim because it found that a dispute existed as to temporal proximity between the request for leave and the discharge and the claim that employer referenced time off and complaints about when her leave would be approved as a reason for discharge.

***Spalla v. Elec. Mfg. Servs. Grp., Inc.*, No. 1:16-CV-821, 2017 WL 569178 (M.D. Pa. Feb. 13, 2017)**

Employee was employed as a customer service representative from April 12, 2012 to November 7, 2014. She received consistently positive reviews while employed. Employee complained that she was subjected to sexual harassment by her co-workers and direct supervisors. Employee claimed that as a result of enduring sexual harassment she developed anxiety and obsessive compulsive disorder and that her supervisors failed to notify her that she could take FMLA leave for her psychological conditions. On November 4, 2014, employee filed a complaint against her supervisor and was terminated three days later, being replaced by a male with less qualifications. Employee filed suit in federal district court, claiming that her employers interfered with her right to take FMLA leave. Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Employee's employer was EMSG, LLC. Individual defendants Hamp and Boyer were employee's supervisors and corporate officers and shareholders of defendant Electronic Manufacturing Services Group, Inc. Defendants argued that employee's complaint failed to satisfy the numerosity threshold of the FMLA. Employee responded, stating that, pursuant to the "intergrated employer theory," the relationship between the two business entities was such that they should be treated as one entity for purposes of FMLA. The court held that employee failed to properly allege the numerosity requirements under the "integrated employer theory" to establish joint-employment between the LLC and her employer. Employee's complaint was dismissed for want of numerosity.

Summarized elsewhere:
***Coulibaly v. Tillerson*, No. 14-0712 (RC), __ F. Supp. 3d __, 2017 WL 3732096 (D.D.C. Aug. 29, 2017)**

B. Consequences

C. Allocation of Responsibilities

Summarized elsewhere:
***Quintana v. City of Alexandria*, 692 F. App'x 122 (4th Cir. 2017)**

VI. Successors in Interest

***Galarza v. Whittle-Kinard*, No. 16-0764 (ES), 2017 WL 4329733 (D.N.J. Sept. 29, 2017)**

Employee began working for St. Michael's Medical Center. Starting in 2013 and continuing until 2015, employee took medical leaves of absence. After a leave of absence taken in 2015, employee's position was eliminated.

After employee's position was eliminated, she filed a lawsuit alleging, among other claims, a violation of the FMLA. Shortly after the lawsuit was filed, St. Michael's filed for Chapter 11 bankruptcy. Employee in turn filed a second lawsuit, this time suing several individuals and Prime Healthcare Services – an entity that purchased St. Michael's assets in the bankruptcy proceedings. Prime filed a motion to dismiss, alleging that it could not be held liable. Prime argued that an order entered in the bankruptcy proceedings as well as the Bankruptcy Code provided that assets purchased in bankruptcy are sold free and clear of all liabilities. The court denied the motion to dismiss without prejudice.

The court acknowledged that the bankruptcy code and the order issued in the bankruptcy proceeding do provide that successor liability claims are not available. But the case law provides that the four exceptions: (1) the successor expressly or impliedly assumes the liabilities; (2) there is an actual or *de facto* consolidation or merger of the two companies; (3) the purchaser is a mere continuation of the seller; or (4) the transaction was entered into fraudulently to escape liability. Employee alleged in the complaint that several of the exceptions applied. Because the court had to accept as true the factual allegations and Prime did not present arguments in response to some of the alleged exceptions, the court had to deny the motion to dismiss at that time.

A. Test

B. Consequences

VII. Individuals

***Edelman v. Source Healthcare Analytics, LLC*, 265 F. Supp. 3d 534 (E.D. Pa. 2017)**

Employee brought a lawsuit against her prior employer and the senior human resources director alleging that she wrongfully terminated following her knee replacement surgery in violation of the FMLA. Specifically, employee informed the senior human resources director that she was ready to return to work, provided she was granted an accommodation limiting her plane or long-distance travel. After receiving no reply from the company, she followed up with another request with only minimal restrictions on her ability to travel. The company responded by directing employee to take additional time off. Upon her return, employer terminated her. Employer argued that employee had exceeded the 12 weeks of leave under the FMLA and also her position had been eliminated. Employee argued that the position elimination was merely pretext as the company continued to actively recruit prospective candidates to fill her position.

Employer brought a motion to dismiss the claim against the human resources director on the grounds that insufficient facts had been alleged to support individual liability under the FMLA. "To determine whether or not an individual is subject to FMLA liability, courts in the Third Circuit use the 'economic reality' test, which 'depends on the totality of the

circumstances." In applying the factors, the district court found that the human resources director "clearly had the power to fire [employee]" and "supervised and controlled [employee's] work schedule by directing her on taking leave and controlling when she could return to work." The district court further found that it was facially plausible, even though not specifically alleged, that the human resources director determined the rate and method of payment, and maintained employment records. Accordingly, the motion to dismiss was denied.

***Gibson v. Ind. State Personnel Dep't*, No. 1:17-CV-01212-RLY-TAB, 2017 WL 6342009 (S.D. Ind. Dec. 12, 2017)**

Employee was director of human resources for the Indiana Department of Correction. Due to familial and work-related stress and depression, employee took leave under the FMLA. On returning to work, she was advised that her employment was terminated. She filed a complaint containing various causes of action, including violations of the FMLA, against the Indiana State Personnel Department and individual defendants Jon Darrow, John F. Bayse, Matthew A. Brown, Bruce Baxter, and Bruce Lemmon. The individual defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted. The individual defendants contended that the individual capacity claims against the individual defendants under the FMLA should be dismissed because the text of the statute did not provide for individual liability against public agency employees. The court stated that this issue had not been decided by the Supreme Court or Seventh Circuit. The Sixth and Eleventh Circuits had held that the FMLA's individual liability provision in 29 U.S.C. § 2611(4)(A)(ii) did not extend to public agencies. But the Third, Fifth, and Eighth Circuits had held that the FMLA permitted individual liability against public agency supervisors. The court said, "[t]he FMLA indicates a relationship between § 2611(4)(ii)-(iv) as inseparable parts of the definition of 'employer'…[B]ecause the definition of "employer" includes public agencies, and the statute provides that an employer May include individuals, it follows that an individual supervisor at a public agency May be held liable." The court said such a finding was in line with that made by other district courts in the Seventh Circuit. The court ruled that Bayse could be sued under the FMLA, but the other individual defendants could not because they had not been named in employee's EEOC charge.

***Pegues v. Miss. State Veterans Home*, No. 3:15-CV-00121-MPM-JMV, 2017 WL 3298684 (N.D. Miss. Aug. 2, 2017)**

Employee claimed that her employer, a veterans' home, refused to accommodate her disability resulting from a ruptured disc by refusing to offer light duty and terminated her employment in violation of the FMLA. Employee had worked for 6 ½ years before her ruptured disc substantially affected her ability to perform ordinary work duties. Employee reported to the Mississippi Workers' Compensation Commission ("MWCC") that despite her doctor's orders to perform light duty work, she was being required by employer to violate those orders. After the MWCC contacted employer, employee was terminated. Employee sued her employer and named as individual defendants the two managers who participated in the decision to terminate her. The court granted employer's motion to dismiss employee's discrimination claims against the two managers on the grounds that discrimination law does not provide for individual liability on the part of managers absent allegations of specific acts suggesting a personalized motive for such discrimination. Employee failed to allege specific actions by the individual defendants were outside their scope as administrators of employer.

***Eichenholz v. Brink's Inc.*, No. 16-cv-11786-LTS, 2017 WL 1902156 (D. Mass. May 9, 2017)**

Employee brought suit against Brink's Inc. and his former supervisor, Gordon Campbell, claiming that employers had mistreated him for requesting medical leave. Employer Campbell filed a motion to dismiss the claims against him. As to the FMLA claims, employer argued that he could not be named as a defendant because the FMLA did not allow claims against individual defendants. The court rejected this argument and held that liability under the FMLA May attach to any "employer," which includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A). While the court recognized that the First Circuit had not decided whether individuals could be held liable under this definition, it found that individuals May be sued under the FLSA whose definition of "employer" was materially identical to the FMLA. Therefore, the court denied employer's motion to dismiss as to the FMLA claims.

***Hall v. Life Care Ctrs. of Am., Inc.*, No. 16-2729-JTM, 2017 WL 552393 (D. Kan. Feb. 10, 2017)**

Employee sued her former employer and her supervisor alleging that she was terminated in violation of the FMLA, 29 U.S.C §2601. Her supervisor filed a motion before the district court to dismiss the FMLA action against her as an individual. The supervisor argued that the complaint failed to allege sufficient facts justifying individual liability on her part as an "employer" for any alleged FMLA violation. Employee stated that employers' answer explicitly acknowledges that the supervisor was the supervisor of employee and the Regional Vice President of the company. Employee added that her supervisor knew about employee's medicals issues and was involved in her termination.

The court found that precedent held that an individual May be subjected to FMLA liability if he or she had corporate responsibilities in addition to those of supervising employee. Here, the court observed that the position of Regional Vice President suggested corporate duties beyond the direct supervision of employee's employment. The court held that, at this stage of the litigation, employee need only to demonstrate a factual basis for recovery which is "plausible on its face." Therefore, the court found no basis for the dismissing action and dismissed employer's motion.

Summarized elsewhere:
***Colter v. Bowling Green-Warren Cnty. Reg'l Airport Bd.*, No. 1:17-CV-00118-JHM, 2017 WL 5490920 (W.D. Ky. Nov. 15, 2017)**

***Craft v. Burris*, No. 16-166-BLG-TJC, 2017 WL 4891520 (D. Mont. Oct. 30, 2017)**

***McCarty v. Purdue Univ. Bd. of Trs.*, No. 4:13 CV 54, 2017 WL 2784413 (N.D. Ind. June 27, 2017)**

***Payne v. Hammond City*, No. CV 15-1022, 2017 WL 1164343 (E.D. La. Mar. 29, 2017)**

CHAPTER 3.

ELIGIBILITY OF EMPLOYEES FOR LEAVE

***Noisette v. Holy City Hosp.*, No. 2:16-2829-RMG, 2017 WL 3314227 (D.S.C. Aug. 3, 2017)**

Employee, proceeding *pro se*, filed suit against her former employer alleging that she lost her job as a result of sexual harassment, in violation of Title VII of the Civil Rights Act of 1964. Employee also alleged that she was terminated because she requested FMLA leave, which resulted in "emotional and mental trauma," loss of her apartment and denial of unemployment benefits. The complaint contained no factual allegations regarding the identity of employee's employer, the persons who harassed her, or any specific details the alleged harassment. The complaint also did not allege that employer was a covered employer under the FMLA, or that employee was eligible for FMLA leave. The court granted employer's motion to dismiss, finding that employee failed to state a claim of sexual harassment or FMLA retaliation because she had not satisfied the elements of the *prima facie* case for either claim.

Summarized elsewhere:
***Sine v. Rockhill Mennonite Home*, No. 17-0043, ___ F. Supp. 3d ___, 2017 WL 3172721 (E.D. Pa. July 26, 2017)**

I. Overview

II. Basic Eligibility Criteria

***Sanders v. Temenos USA, Inc.*, No. 16-cv-63040, 2017 WL 3336719 (S.D. Fla. Aug. 4, 2017)**

Employee filed suit alleging, among other things, interference and retaliation under the FMLA arising out of his termination by employer. Employee suffered from depression for which he occasionally missed work and left for a time to care for his wife, who was suffering from cancer. The court granted employer's motion to dismiss, finding that employee failed to plead that he was eligible for FMLA leave. Employee's amended complaint did not contain facts related to the number of employees employer employed at employee's worksite or within 75 miles of his worksite, which the court held was dispositive of his FMLA claim.

***Bowie v. Costco Wholesale Corp.*, No. 16-5808-BRM-LHG, 2017 WL 3168985 (D.N.J. July 26, 2017)**

Employee filed a complaint alleging, principally, violations of the FMLA. Employers filed a motion to dismiss and filed a partial answer to employee's complaint. Employee opposed to the motion. Employee alleged that he requested FMLA time off in order to care for his disabled son during a meeting with his superior, that his request was denied, and because of the denial of this request, he was forced to found another solution to take care of his son. Employee alleged that he was terminated for leaving work early to take care of his disabled child.

Employers argued that employee did not allege that he was eligible for an FMLA leave and, in the alternative, he did not demonstrate an interference or retaliation claim. Employee replied that he demonstrated that he was eligible because he was employed by employers for more than twelve months. The court held that employee failed to establish sufficient facts to demonstrate that he was entitled to FMLA. The court found that even if employee demonstrated

that he was employed by employers for at least twelve months, he failed to indicate the number of hours worked during his employment. The court held that employee must allege the total number of hours worked, his weekly schedule, his status as a full-time or part-time employee, or any other relevant allegation in order to establish that he worked at least 1,250 hours in the 12-mongt period prior to his request as required by the FMLA.

Therefore, the court granted employers' motion to dismiss on this basis but granted employee's request to amend his complaint.

***Colvin v. Volusion, Inc.*, No. A-17-CV-139-LY, 2017 WL 2805010 (W.D. Tex. June 28, 2017)**

Employee injured his hand and attempted to seek medical leave by informing employer in October 2015 that he was to have surgery on his hand on November 2, 2015 and needed medical leave to recover from the surgery. Five days before his surgery, employer terminated employee. Employee thereafter brought suit with several causes of action, including claims under the FMLA contending employer: (1) interfered with, restrained, or denied the exercise or attempted exercise of his FMLA rights; (2) discriminated or retaliated against him for exercising or attempting to exercise his FMLA rights, and (3) terminated him because he exercised his rights FMLA rights. Employer brought a motion to dismiss employee's claims, *inter alia*, employee's FMLA interference and retaliation claims.

Magistrate Judge Andrew W. Austin in the United States District Court for the Western District of Texas issued a report and recommendation to district court Judge Lee Yeakel in which he granted, in part, employer's motion to dismiss, specifically as to employee's FMLA claims. The court held that employee was not eligible for FMLA leave, stating the FMLA's requirements that an employee must be employed for a period of twelve (12) months in order to be eligible for leave under the statute. While the court noted the 12-month requirement does not necessarily apply to the date which the employee puts their employer on notice of expected FMLA leave, the employee must have been working for the employer for 12 months as of the date the leave is to commence. Employee himself admitted in his complaint that he would not have become eligible for FMLA leave until November 7, 2015 (his 1-year work anniversary). Because employee requested leave to commence on November 2, 2015, the court held employee would have been ineligible for FMLA leave and thus his FMLA interference and retaliation claims were properly subject to dismissal.

***Bailey v. Reg'l Radio Grp. LLC*, No. 1:15-CV-375 (FJS/DJS), 2017 WL 1025948 (N.D.N.Y. Mar. 15, 2017)**

Employee sued employer asserting four causes of action, among them, a claim that employer violated her rights under the FMLA when it refused to grant her time off under the FMLA. Employer moved to dismiss employee's FMLA claim.

Employer argued that it did not employ 50 or more employees in the current or preceding calendar year in which employee filed her claim against the person or employer and thus was not subject to FMLA. The court granted employer's motion holding that because employer did not employ more than 29 employees in the current or preceding year in which employee filed her claim against employer, employee was not entitled to a leave under the FMLA.

***Becton, II v. St. Louis Reg. Pub. Media, Inc.*, No. 4:16-CV-1419 CAS, 2017 WL 769900 (E.D. Mo. Feb. 28, 2017)**

Employee accuses his former employer of interfering with his rights under the FMLA: firing him immediately upon his return from a medical appointment. That is, employer failed to restore employee to his job as the FMLA requires. But employer argued – and the court agreed – that employee had no entitlements under the FMLA. Though job restoration is certainly an FMLA right, an employee must first be eligible. An eligible employee under the FMLA has been employed for at least 12 months by employer and provided at least 1,250 hours of service during the previous 12-month period. As employee was employed by employer for less than one year, he was not an eligible employee under the FMLA. Therefore, employee failed to state a claim upon which relief could be granted. Employee's claim was not plausible on its face, and so, the court granted employer's 12(b)(6) motion to dismiss employee's FMLA claim.

Summarized elsewhere:
***Alcegaire v. JBS USA, LLC*, No. 3:15-cv-266-DJH-CHL, 2017 WL 4288882 (W.D. Ky. Sept. 27, 2017)**

***Gilliam v. Joint Logistics Managers, Inc.*, No. 4:16-cv-04077-SLD-JEH, 2017 WL 758459 (C.D. Ill. Feb. 27, 2017)**

III. Measuring 12 Months of Employment

***Jones v. Maywood Melrose Park Broadview Sch. Dist. 89*, No. 16-cv-09652, 2017 WL 2936709 (N.D. Ill. July 10, 2017)**

Employee worked as a teacher's assistant for defendant Maywood Melrose Park Broadview School District No. 89. In February 2016, employee applied for FMLA leave to care for his mother, who recently had been diagnosed with cancer. On March 11, 2016, employer Davis Brusak, the school's assistant superintendent of human resources, approved employee's FMLA request, "which they dated back to February 23, 2016 and set to end on May 15." On May 11, Brusak sent employee a letter indicating that his FMLA leave would expire on May 16. Brusak stated in his letter that employee's request to extend his leave was not approved. Employee claimed that employer miscalculated employee's FMLA time. Employee contended that employer had a policy regarding FMLA indicating that an "eligible employee May take FMLA leave for up to a combined total of 12 weeks each 12-month period" and that "[a]ny full workweek period during which the employee would not have been required to work, including summer break, winter break and spring break, is not counted against the employee's FMLA leave entitlement." Employee asserted that 12 weeks from February 23, 2016 – the first day of his FMLA leave – was May 17, not May 15. Employee did not show up for work or call his employer from Monday, May 16 through Friday, May 20, or Monday, May 23. Employee alleged that the "No Call/No Show" discipline, which employer gave him for these days, was used by employer to terminate his employment. Employee filed a complaint against employer for FMLA interference and retaliation, and employer filed a motion to dismiss.

Employer argued that employee offered no allegations to support his claim that he was entitled to FMLA leave beyond May 15, 2016. The court disagreed, stating that employee clearly alleged that employer miscalculated his FMLA by not considering spring break. In fact, employee was entitled to FMLA leave through Tuesday, May 24, 2016. Employer further

argued that employee had not provided employer with sufficient notice regarding his intent to extend his FMLA leave. The court said employer's contention missed the mark. Employee's FMLA claims were not premised on employer's denying his request for an extension of FMLA leave. Employee claimed he was improperly denied a twelfth week of FMLA leave to which he was entitled when he applied for and was approved for FMLA leave in February 2016. The court denied employer's motion to dismiss employee's FMLA interference claim.

Regarding employee's FMLA retaliation claim, employee satisfactorily satisfied the two elements of an FMLA retaliation claim by alleging he engaged in statutorily protected activity by taking FMLA leave and suffered an adverse employment action when employer terminated him on June 9, 2016. Employer argued that employee could not demonstrate causation. The court said employee showed that employer miscalculated his FMLA leave, disciplined him for failing to return to work on May 15, 2016, and then considered this discipline as a negative factor against him when moving for his termination. The court stated that employee had demonstrated causation, and denied employer's motion to dismiss employee's FMLA retaliation claim.

***Johnson v. Jondy Chems., Inc.*, No. 3:16-CV-01734-MO, 2017 WL 1371271 (D. Or. Apr. 13, 2017)**

Employee brought suit claiming that employer, Jondy Chemicals, interfered with employee's right to take FMLA leave. Employer filed a Motion to Dismiss seeking to dismiss employee's FMLA claim arguing that employee was not an eligible employee for purposes of the FMLA leave since he had not been employed by employer for at least 12 months.

The court found that the fact that an employee commences his treatment and leave as non-FMLA leave, does not, in and of itself, bar employee's rights in subsequent FMLA leave for the same treatment during the same contiguous absence. Here, employee began working as a full time salaried employee beginning April 1, 2015. On June 9, 2015 employee discovered he had cancer and would require surgery. Soon thereafter he informed employer that he would need to take leave for treatment. On July 24, 2014 employer informed employee that he was terminated from his position effective August 31, 2015. The court noted that employee could have invoked FMLA protected leave by notifying employer of his necessity for treatment when he was to become an eligible employee on April 1, 2016, even though he began treatment on September 2, 2015, while he was ineligible. In order to do so, employee must have alleged that on or around June 9, 2015, he was aware that his cancer treatment would extend until after April 1, 2016, and that his treatment would have also required leave after April 1, 2016, and he must have conveyed this necessity to employer or employer must have had sufficient information to reasonably determine that FMLA applied to employee's leave request. Given that employee did not provide such facts in the Complaint, the court dismissed employee's interference claim under the FMLA without prejudice.

Summarized elsewhere:
***Sine v. Rockhill Mennonite Home*, No. 17-0043, ___ F. Supp. 3d ___, 2017 WL 3172721 (E.D. Pa. July 26, 2017)**

***Colvin v. Volusion, Inc.*, No. A-17-CV-139-LY, 2017 WL 2805010 (W.D. Tex. June 28, 2017)**

IV. Measuring 1,250 Hours of Service During the Previous 12 Months

***Germundson v. Armour-Eckrich Meats, LLC*, No. C16-3103-LTS, __ F. Supp. 3d __, 2017 WL 3568673 (N.D. Iowa Aug. 17, 2017)**

Employee brought suit against her former employer, a lunchmeat and boneless ham production plant, asserting employer interfered with her right to take leave pursuant to the FMLA when she missed work to stay with her hospitalized adult son. Employee brought a motion to dismiss, or in the alternative, summary judgment, in the Northern District of Iowa. Employer argued that employee was not an eligible employee under the FMLA because she did not work at least 1,250 hours during the previous 12 month period.

The first discrepancy between the parties' calculations concerned employee's early clock-in and late clock-out time in the records. Employee could not establish that she was paid for the periods between her clock-in and clock-out times and the beginning and end of her shift, or that she worked during these periods. Only the number of hours actually worked May be counted. Thus, employee's calculated hours based strictly on the clock in/clock out times did count toward the requisite 1,250 hours. The second discrepancy involved half-hour meal breaks automatically deducted from employee's hours worked. Since employee worked through eight meal breaks, the time automatically deducted was counted towards employee's hours worked.

The third discrepancy involved hours employee spent at, or traveling to and from, medical appointments. Under the FLSA, time spent by an employee in waiting for or receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked. Time spent that employee attended medical appointments on work days, but not during her normal working hours, is properly not included in the total hours worked. Also, hours that employee attended medical appointments while on medical leave, and therefore was not working, were properly not included in the calculation. Accordingly, employee was not an eligible employee because she had not worked at least 1,250 hours during the previous 12-month period. The court granted employer's motion to dismiss pursuant to FRCP 12(b)(1).

***Beckman v. Wal-Mart Stores, Inc.*, No. 1:15-cv-1284-GJQ, 2017 WL 4409097 (W.D. Mich. Oct. 4, 2017)**

Employee filed claims against employer that it failed to accommodate his double hernia disability and terminated him due to his disability, retaliated against him by filing an EEOC charge, and interfered with his FMLA rights by not allowing additional leave, granting an accommodation, and forcing him to take time off work and use FMLA time. The court granted summary judgment as to all claims.

Employee was employed by employer as a shipping loader at its distribution center. Moving, lifting, carrying, and placing things weighing greater than 60 pounds was an essential function of his job. Employee informed employer that he had a hernia that could cause work restrictions. Over the following year, he used FMLA leave to take time off due to his hernia, including surgery and recovery. However, employee had a number of unexcused absences, and had reached the final step in employer's performance tracking system. He was terminated shortly afterwards for an absence which he contended FMLA leave should have been granted.

Regarding employee's claim that employer did not grant him additional leave, the court stated that in order to be eligible for FMLA leave, an employee must have "been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave." 29 C.F.R. § 825.110(a)(2). Though employee had 66 hours of possible FMLA leave, his doctor had released him back to work without restrictions following his hernia surgery, and employee had not worked the required 1,250 hours in the previous 12 months at the time of his termination, so he was ineligible for FMLA leave. Employee alleged he requested light duty work, but employer required him to be at 100% in order to return to work. The court held that the FMLA doesn't require employers to offer light duty work as an alternative to FMLA leave because, in contrast to the ADA, the FMLA does not create workplace rights. Regarding employee' claim that employer forced him to use FMLA time, the court said that employee did not offer any evidence or specific instance to support this claim. The instances in which employee utilized FMLA leave were, based on the record, voluntary, and not forced upon him by employer.

***Holladay v. Fairbanks N. Star Borough Sch. Dist.*, No. 4:15-cv-00011-SLG, 2017 WL 2918955 (D. Alaska July 7, 2017)**

Employee, an aide in employer's Autism Outreach program, filed a complaint against employer, alleging interference under the FMLA. Employer moved for summary judgment. Employer stated that employee's claim was time-barred. The court said FMLA claims are not subject to the 300-day period that governs employment discrimination claims. An employee May bring an action under the FMLA no later than *two years* after the date of the last event constituting the alleged violation for which the action was brought. Employee requested, and was denied, FMLA leave no earlier than August 23, 2013. She filed suit on May 7, 2015, so her FMLA claim was timely. Employer contended that even if her claim was timely, she was not entitled to FMLA leave, as she had not worked 1,250 hours in the preceding 12 months (i.e., between August 29, 2012 and August 28, 2013). The payroll logs showed she worked just 805 hours during this time period. Employee argued that the payroll logs were inaccurate, and she had worked through lunch and other scheduled breaks, and stayed after hours. Employee claimed employer had interfered with her FMLA rights by demanding she sign a medical release form as a condition of obtaining FMLA leave. The court said that due to the existence of several genuine issues of material fact, it could not conclude as a matter of law that employee was not entitled to FMLA benefits, or that employer interfered with her FMLA rights. Employer's motion for summary judgment on employee's FMLA interference claim was denied.

Summarized elsewhere:
***King v. Ford Motor Co.*, 872 F.3d 833 (7th Cir. 2017)**

***Cannon v. Univ. of Tenn.*, No. 3:15-CV-576, 2017 WL 2189565 (E.D. Tenn. May 17, 2017)**

***Bailey v. Reg'l Radio Grp. LLC*, No. 1:15-CV-375 (FJS/DJS), 2017 WL 1025948 (N.D.N.Y. Mar. 15, 2017)**

V. Determining Whether the Employer Employs Fifty Employees within 75 Miles of the Employee's Worksite

***Brooks v. Prospect of Orlando, Ltd.*, No. 3:16-CV-1089-J-34JBT, 2017 WL 6319552 (M.D. Fla. Dec. 11, 2017)**

Employee worked for employer at its Jacksonville, Florida location as a wheelchair assistant. One of her responsibilities was handling luggage. On April 6, 2015, employee experienced stomach pain and visited the Center for Women and Children, where she learned she was one-month pregnant. On April 7, employee gave her supervisors a physician's letter, which explained that lifting luggage was the cause of her stomach pain. On May 20, after employee had been rushed to the emergency room due to stomach pain, employee's supervisor told employee she was being placed on involuntary FMLA leave. Employee was told she would receive paperwork from supervisor in a couple days, but the paperwork never arrived. Because employee received no paperwork, she assumed employer had terminated her on May 20. Employer stated she had not been terminated and rejected a claim that employee filed in June for unemployment compensation. In December, employee gave birth to a baby girl. Neither employer nor employee initiated communications about employee returning to work. In August 2016, employee filed a complaint against employer. Employee claimed employer interfered with her FMLA rights by forcing her to take FMLA leave and then failing to provide her with notice of her rights under the FMLA, and employer retaliated against her by refusing to let her work. Employer filed a motion for summary judgment, contending employee was not eligible for FMLA leave. Employee sought partial summary judgment on the issue of equitable estoppel. Employee argued that the doctrine of equitable estoppel barred employer from challenging her eligibility because employer had represented to employee that she was protected under the FMLA.

To prevail on an FMLA interference or retaliation claim, an employee must establish that he or she is eligible for FMLA protection. The FMLA excludes, from its definition of an eligible employee, "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." *See* 29 U.S.C. § 2611(2)(B)(ii)). This is known as the FMLA's "worksite requirement." The court stated that in the Eleventh Circuit, it was the employee's responsibility to satisfy the worksite requirement. There was no genuine dispute that employer employed less than 50 people at its Jacksonville location, and operated no other locations within 75 miles of Jacksonville. The court said employee's failure to satisfy the worksite requirement was fatal to all of her FMLA claims. Even if this were not so, employee's interference claim failed to the extent that it was based on an involuntary leave theory. The court said the Eleventh Circuit had noted that an involuntary leave claim would "'ripen[ ] only when and if the employee seeks FMLA leave at a later date, and such leave is not available because the employee was wrongfully forced to use FMLA leave in the past.'" *Grace v. Adtran, Inc.*, 470 F. App'x 812, 816 (11th Cir. 2012) (citing *Wysong v. Dow Chem. Co.*, 503 F.3d 441, 449 (6th Cir. 2007)).

Regarding employee's equitable estoppel claim, the court said the Eleventh Circuit had not determined whether the doctrine could be used to preclude an employer from challenging an employee's eligibility under the FMLA. However, the doctrine's applicability to the FMLA did not matter here, because employee had not been able to satisfy the elements of a *prima facie*

equitable estoppel claim. Employee had failed to show detrimental reliance. After all, she had been placed on *involuntary leave*.

It was never explained why employer placed employee on involuntary FMLA leave, for which she was not eligible. Prospect of Orlando has multiple locations, and its handbook mentions that Prospect employees are eligible for FMLA leave, but does not mention the worksite requirement that affects Jacksonville.

Summarized elsewhere:
***Scott v. ProClaim Am., Inc.*, No. 14-CV-6003 (DRH) (ARL), 2017 WL 1208437 (E.D.N.Y. Mar. 31, 2017)**

A. Determining the Number of Employees

Summarized elsewhere:
***Dunlap v. United Outstanding Physicians*, No. 15-CV-14022, 2017 WL 395237 (E.D. Mich. Jan. 30, 2017)**

B. Measuring the Number of Miles

C. Determining the Employee's Worksite

VI. Individuals Who Are Deemed To Be Eligible Employees Under the FMLA

***Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of N.Y. & N.J.*, No. 16cv3907, __ F. Supp. 3d __, 2017 WL 4838320 (S.D.N.Y. Oct. 24, 2017)**

An employee labor union, representing police officers employed by the employer interstate governmental agency, brought an action alleging violations of the FMLA. After the labor union and the employer agency negotiated an employment agreement, which included provisions for medical and fitness-for-duty examinations, the labor union then alleged that the provisions violated the FMLA.

The district court granted summary judgment in favor of the employer agency on the FMLA claim. The employee labor union could not bring an action under the FMLA as a matter of law, whether on its own behalf or on behalf of its members. The court was guided by precedent cases using the Fair Labor Standards Act's ("FLSA") definition of "employee" or "eligible employee." Further, the FMLA's legislative history reveals that Congress wanted to adopt the FLSA's definition of employee in enacting the FMLA.

***Henao v. Hilton Grand Vacations Co., LLC*, No. 16-00646 DKW-RLP, 2017 WL 4479253 (D. Haw. Oct. 6, 2017)**

Employee, a sales agent hired by Hilton in 2012, brought suit for wrongful termination under the Hawaii Whistleblower Protection Act ("HWPA"). Employee alleged that employer unlawfully terminated his employment in July 2016 because he complained about age discrimination against "older sales agents" and employer's sales commission practices. However, employee was never terminated and, in fact, does not dispute that after the date on which he claims he was terminated, he requested and was granted leave from his real estate sales position with employer, pursuant to the FMLA, and, weeks later, requested that employer

terminate him so he could apply for unemployment insurance benefits. Because "FMLA rights and benefits are contingent upon the existence of an employment relationship," and FMLA leave is available only to an "eligible employee," the district court reasoned that employee could neither have requested nor been granted FMLA leave twice – retroactively from July 1 through July 8, and then, from July 8 through July 26, 2016 – if he had, in fact, already been terminated by employer on July 4, 2016. Since employee offered no compelling factual or legal rebuttal to the plain language of the FMLA, the Ninth Circuit's holding in *Walls v. Central Contra Costa Transit Authority* (653 F.3d 963 (9th Cir. 2011)) that FMLA rights cannot be exercised after the termination of relationship, or his own conduct following his professed firing, the district court granted summary judgment for employer.

Summarized elsewhere:
***Sanders v. Temenos USA, Inc.*, No. 16-cv-63040, 2017 WL 3336719 (S.D. Fla. Aug. 4, 2017)**

VII. Exception for Certain Airline Employees

CHAPTER 4.

ENTITLEMENT OF EMPLOYEES TO LEAVE

***Taulbee v. Univ. Physician Grp.*, No. 16-10807, 2017 WL 3169241 (E.D. Mich. July 26, 2017)**

Employee Kelly Taulbee, a registered nurse formerly employed by employer, University Physician Group, brought suit against employer asserting FMLA interference and retaliation claims.

Employee alleged employer interfered with her attempt to exercise her FMLA rights by refusing to grant her request for time off to attend an out of town wedding. Employee contended that while the wedding was the only reason listed in her request, she also informed her supervisors about a brother in "rehab," a sister-in-law dying of cancer, her grandmother dying of old age, and her own fibromyalgia flare-ups. The court granted employer's motion for summary judgment on the interference claim. It held that the brother, sister-in-law, and grandmother's situations were not FMLA-qualifying reasons, and that the evidence did not suggest employee's doctors ever told her she could not work or perform any of the essential functions of her job due to her fibromyalgia. Further, her statement to a supervisor that she would "go on medical" if her request was not approved did not qualify as notice of her need for FMLA leave because she failed to provide enough information for employer to reasonably conclude that she was making a request for FMLA leave.

Employee also alleged employer retaliated against her by terminating her for attempting to exercise her rights under the FMLA. The court granted summary judgment on this count for the same reasons detailed above. Employee failed to show she was engaged in a statutorily protected activity and failed to show her supervisors knew she was exercising her FMLA rights.

I. Overview

II. Types of Leave

Summarized elsewhere:
***Taulbee v. Univ. Physician Grp.*, No. 16-10807, 2017 WL 3169241 (E.D. Mich. July 26, 2017)**

A. Birth and Care of a Newborn Child

B. Adoption or Foster Care Placement of a Child

C. Care for a Covered Family Member with a Serious Health Condition

1. Eligible Family Relationships

***Duarte v. St. Barnabas Hosp.*, 265 F. Supp. 3d 325 (S.D.N.Y. 2017)**

Employee, who was employed by employer as a clinician, asserted, among other claims, that employer interfered with her rights under the FMLA and engaged in unlawful retaliation when it terminated her employment. Employer argued on summary judgment that employee's FMLA claims must be dismissed as employee was not entitled to leave under the FMLA. Specifically, employee sought leave to care for employee's ill brother and see her brother-in-law. As the FMLA does not entitle employees the right to take leave to care for or see a sibling, employee could not demonstrate that she was entitled to leave. The district court found that the FMLA claims fail as a matter of law and dismissed both the interference and retaliation claims.

a. Spouse

Summarized elsewhere:
***Davidson v. Evergreen Park Cmty. High Sch. Dist. 231*, No. 15 C 0039, 2017 WL 2243096 (N.D. Ill. May 23, 2017)**

b. Son or Daughter

c. Parent

d. Certification of Family Relationship

2. "To Care for"

Summarized elsewhere:
***Smith v. Senderra RX Partners, LLC*, No. 16-10131, 2017 WL 878005 (E.D. Mich. Mar. 6, 2017)**

D. Inability to Work Because of an Employee's Own Serious Health Condition

***Workneh v. Super Shuttle Int'l, Inc.*, No. 15 CIV. 3521 (ER), 2017 WL 6729297 (S.D.N.Y. Dec. 28, 2017)**

In its March 28 Order, the court dismissed employee's FMLA claim because he failed to include any information concerning the condition that he suffered from, much less indicate that it was a "serious health condition" as defined by the statute. Employee then filed a third amended complaint ("TAC"), alleging FMLA interference, and employer moved to dismiss.

In his TAC, employee tried to cure the previous deficiency by asserting he spent a night at the hospital and experienced a "period of incapacity" that required him to stay at home for more than two weeks. While employee did not provide specific dates, his factual allegations elsewhere in the TAC made clear that his hospital stay and two-week period of incapacity

pertained to his February 2013 request for sick leave, which employer denied. Employee also alleged in his TAC that employer denied requests for sick leave he made in January and July 2013.

The court stated that employee failed, in his TAC, as in his prior complaints, to indicate whether his three requests for leave arose from the same health condition. With respect to his January 2013 request, employee did not allege that he had a serious health condition. He merely stated that he requested sick leave in a text message, that employer denied his request for sick leave, and that he took over-the-counter medication and went to work. Because employee failed to allege that he had a serious health condition – or any health condition – the court dismissed his FMLA claim based on his January 2013 request.

With respect to his February 2013 request, employee did allege he suffered a serious health condition. He claimed he spent a night in the hospital and was incapacitated for two weeks. However, employee brought the instant action more than two years after employer allegedly denied this request, and failed to allege that he was entitled to a three-year statute of limitations on account of employer's willful actions. The court stated that the FMLA claim based on his February 2012 request was time-barred and, as such, dismissed.

Finally, with respect to his July 2013 request, employee alleged that he requested sick leave because he had a post-surgery appointment. While this particular claim was timely, employee did not state that this appointment had any connection to his February 2013 health condition. The court said that in order to come within the FMLA's protection, he should have alleged that his condition fell within the "continuing treatment" alternative of the "serious health condition" definition. Department of Labor ("DOL") regulations outline five categories of such conditions: (1) incapacity and treatment, (2) pregnancy or prenatal care, (3) chronic conditions, (4) permanent or long-term conditions, and (5) conditions requiring multiple treatments. Employee's allegation that he had a post-surgery appointment – and its implication that he had surgery in the first place – did not place his July 2013 condition within any of the five categories of "continuing treatment." Employee did not allege that his surgery was restorative or that he had a condition that would lead to incapacity, as the DOL requires of claims made under the fifth category. The court stated that the FMLA claim based on his July 2013 request did not sufficiently allege that he had a serious health condition and was dismissed.

***Boyd v. Univ. of Detroit Mercy*, No. 16-14375, 2017 WL 6610621 (E.D. Mich. Dec. 27, 2017)**

Employee worked in defendant University of Detroit Mercy's mail delivery services department. Shortly after beginning his employment, he began having performance problems including tardiness, absences, clocking in at unauthorized work locations, and repeated unauthorized departures from campus. Employee was terminated in November 2009 but filed a grievance with his union. Employee and employer entered into a Last Chance Agreement ("LCA"), which provided that employee would be reinstated, but during the 24 months following reinstatement any unsatisfactory work performance would result in immediate termination with no right of recourse to the grievance procedure. Shortly after entering into the LCA, employee had several tardies. He was disciplined but continued with his employment. In 2014, employee again had issues with attendance and tardiness, and was terminated effective December 15, 2014. Employee filed a complaint including claims of FMLA interference and retaliation. Employer filed a motion for summary judgment.

Employee based his FMLA claims on the contention that he suffered a shoulder injury on or before November 11, 2014, that he was off work for the next three days and properly reported his absences, returning to the HR department on November 17 with a doctor's certificate. Employee said he was scolded by the HR rep, that the paperwork he provided was torn, and he was subsequently told he was not granted FMLA, and was given three days of unexcused absence which called for termination. The court stated that employer was entitled to summary judgment on employee's FMLA interference claim as a matter of law because, for FMLA purposes, employee's shoulder injury could not be considered a "serious health condition." He was treated for this condition just once at Southfield City Urgent Care. He was given a prescription for Naproxen 500 which he did not fill. His X-ray was negative for any abnormalities of the shoulder. His return to work form contained no diagnosis and no limitations. Nor could employee prevail on his FMLA retaliation claim. The court said employee failed to establish a causal connection between his alleged submission of FMLA paperwork and termination a month later, after several documented instances of no-calls and tardiness. Temporal proximity between an employee's (alleged) legally protected activity and an adverse employment action is insufficient, without more, to establish a causal connection for purposes of a *prima facie* FMLA retaliation claim. Even if employee had made out a *prima facie* case for FMLA interference and retaliation, summary judgment was still appropriate, because employee's poor attendance record provided employer with a legitimate, non-discriminatory reason for terminating him.

***Buck v. Mercury Marine*, No. 16-CV-1013-PP, 2017 WL 6557556 (E.D. Wis. Dec. 22, 2017)**

Employee began working for defendant Mercury Marine on September 24, 2012. Two months later, employer transferred employee to third shift (a shift he had never worked before). Third shift lasted from 11:00 PM to 7:00 AM. Employee was a member of the International Association of Machinists union. The contract, under the union, specified that employees accruing eight points during a year for unexcused absences were subject to termination. On Monday, May 26, 2014, employee called his supervisor and requested a vacation day for his May 27 shift. He did not reveal that he was upset about having had to put his 13-year-old dog down the previous weekend, or that he had not slept since his dog died. Employer granted the vacation day and did not assess points against employee. On May 27, employee left a voicemail for his supervisor, telling him he was upset about having put down his dog. Employee received a call back. Employee stated in a declaration that he told the caller he had not slept for days and could not work his shift on May 28. Employer contended that employee's testimony served as the only record of the May 27 telephone conversation, and employee did not provide the name of the person with whom he spoke. Employee did not report for work on May 28 and was assessed a point. On June 3, employee received a written warning for having accrued 6.5 unexcused absence points, one of which was for his May 28 absence. On August 25, employee was terminated for having accrued eight points in one year. Employee filed a complaint for FMLA interference. Employer filed a motion for summary judgment.

Employer disputed that employee (1) had been entitled to take FMLA leave and (2) had provided sufficient notice of his intent to take FMLA leave. Employee claimed employer terminated him in violation of the union collective bargaining agreement and violated this agreement in calculating his absence points, including the one they gave him for May 28. The court stated that whether employer violated the collective bargaining agreement was an issue for a union grievance hearing. The only claim before the court was that of FMLA interference. The court granted employer's motion for summary judgment. (1) Employee was not entitled to take

FMLA leave because he did not have a serious health condition. The only proof in the record that employee suffered from shift-related insomnia or that he had obtained 45 days of treatment for this condition was employee's own word, in his deposition testimony and in his declaration. The record contained a letter from a nurse at Aurora Center North who said that employee had been seen on May 29 for an evaluation of situational insomnia and that he should be excused from work *for one day* (May 28). (2) Employee failed to provide employer with sufficient notice of his intent to take FMLA leave. Regarding employee's contention that he was not able to request leave, because employer failed to offer it to him, the court said an employee is not required formally to request FMLA leave. An employer must provide FMLA notifications to an employee when it acquires knowledge that an employee's leave May be for an FMLA-qualifying reason. But employee failed to give employer such a reason. Employer knew (as of May 26) that employee wanted one vacation day. Employer knew (as of May 27) that employee was upset about his dog. Employer knew (as of May 29) that employee had seen a nurse to be evaluated for situational insomnia. But employer had no way of knowing that employee was suffering from a serious health condition that warranted FMLA leave.

***Goss v. Umicore USA*, No. 15-555-JJM-PAS, 2017 WL 3981295 (D.R.I. Sept. 8, 2017)**

Employee brought an action against his former employer in the District of Rhode Island for claiming employer violated the FMLA when employee was terminated for excessive absenteeism. Employer and employee filed competing summary judgment motions.

During his first period of absence, the court found that employee could not establish that his bronchitis satisfies the statutory definition of a serious health condition. He did not receive inpatient treatment for his bronchitis, and employee could not establish that his bronchitis involved continuing treatment by a healthcare provider since he was not incapacitated for more than three consecutive days. As such, employee's absences for his bronchitis did not implicate the FMLA.

The second period of absence is whether employee gave adequate notice to employer with sufficient information for employer to reasonably determine whether FMLA May apply to the leave request. Although an employee does not need to specifically say "FMLA," he does need to suggest that his health condition could be serious. Throughout his absence, employee repeatedly informed employer of the seriousness of his illness. Finally, employee notified employer that his physician ordered tests and did not want him returning to work until the tests were in. The court found these notices contained sufficient information for employer to determine whether the FMLA May apply. Employee stated the serious nature of his conditions; details known to him; and the length of his continue absences. Employee's summary judgment was granted as to his period of absence for his stomach illness.

***Valdivia v. Twp. High Sch. Dist. 214*, No. 16 C 10333, 2017 WL 2114965 (N.D. Ill. May 15, 2017)**

Employee was employed as a secretary by employer and brought suit under the FMLA for employer's interference with her FMLA right to take job-protected leave. The district court denied employer's motion to dismiss.

Employee resigned from her position and then sought reinstatement but was denied as employer had hired a replacement and employer's school board had accepted employee's

resignation. Shortly thereafter, employee was hospitalized for four days and diagnosed with depression, anxiety disorder, panic disorder, and insomnia. In addition, employee alleged employer interfered with her rights under the FMLA by failing to provide her with notice that she had a right to take job-protected leave because employer knew or should have known she was suffering from a medical condition that made her unable to perform her job and was surreptitiously forced to resign. Under the FMLA, an employee's duty is to place employer on notice of a probable basis for FMLA leave. The court denied employer's motion to dismiss for failure to state a claim for interference with the FMLA. Employer was on notice employee May have been suffering from a serious health condition when employer's employee asked her to decide whether to resign. Due to the length of time employer's employee knew employee, the employee would have known employee's dramatic departure from her normal behavior. Further, the Seventh Circuit has pointed out that an employee with a mental health condition – such as depression – May be excused from giving direct notice because the medical condition May prevent communicating the nature of the illness.

***Chipman v. Cook*, No. 3:15-CV-143 KGB, 2017 WL 1160585 (E.D. Ark. Mar. 28, 2017)**

Employee was employed by employer as an officer manager. Employer's absentee policy states that an employee will be automatically dismissed if an employee is absent three days without notifying the elected official and/or supervisor and requires a doctor's note upon return to work. Employee was involved in a car accident. The treating physician ("doctor") at the hospital prescribed employee pain medication and released her with instruction to follow-up with her primary doctor if her condition did not improve. Employee did not receive additional medical treatment related to the car accident.

Employee's boyfriend contacted employee's co-worker to report that employee had been involved in a car accident and would not be at work. The following week, employee returned to work without a doctor's note and was terminated for unexcused absences and failing to call her supervisor to report her absences. Employee filed a claim for FMLA interference and retaliation. Employee alleges that employer failed to provide her with the requisite documents to designate her FMLA leave and failed to provide at least 15 days to certify her leave, thereby violating her rights under the FMLA. Employee also alleges that by terminating her, employer discriminated against her in violation of the FMLA.

On a motion for summary judgment, employer argued that employee's FMLA claims should be dismissed because employee was not suffering from a serious medical condition entitling her to the protections under the FMLA. A serious health condition is an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. For an employee to be suffering from a serious health condition, the regimen of continuing treatment requires that the treatment involve supervised care by a health care provider. Applying the definition of serious health condition to the facts of this case, the court found that employee was not suffering from a serious medical condition because employee did not follow-up with any doctors and her prescription was not being supervised by a health care provider.

Summarized elsewhere:
***Hodnett v. Chardam Gear Co.*, No. 16-10619, 2017 WL 6621527 (E.D. Mich. Dec. 28, 2017)**

***Fralick v. Biaggi's Inc.*, No. 16-CV-1015, 2017 WL 6543862 (C.D. Ill. Dec. 21, 2017)**

***Percell v. Commw. of Ky. Dep't of Military*, No. 3:16-CV-721-TBR-LLK, 2017 WL 6347973 (W.D. Ky. Dec. 12, 2017)**

***Garrison v. Dolgencorp, LLC*, No. 4:16-CV-00349-DGK, 2017 WL 6045481 (W.D. Mo. Dec. 6, 2017)**

***Strulson v. Chegg, Inc.*, No. 3:15-CV-00828, 2017 WL 6003085 (W.D. Ky. Dec. 4, 2017)**

***English v. Estes Express Lines*, No. 516CV01353CASSKX, 2017 WL 5633037 (C.D. Cal. Nov. 21, 2017)**

***Alcegaire v. JBS USA, LLC*, No. 3:15-cv-266-DJH-CHL, 2017 WL 4288882 (W.D. Ky. Sept. 27, 2017)**

***Kim v. Bogopa Servs. Corp.*, No. 15-CV-2174 (ILG) (LB), 2017 WL 3242253 (E.D.N.Y. July 28, 2017)**

***Taulbee v. Univ. Physician Grp.*, No. 16-10807, 2017 WL 3169241 (E.D. Mich. July 26, 2017)**

***Dallefeld v. The Clubs at River City, Inc.*, No. 1:15-cv-01244-JES-JEH, 2017 WL 3013241 (C.D. Ill. July 14, 2017)**

***Crawford v. Ga. Dep't of Transp. (GDOT)*, No. 1:16-CV-3810-WSD, 2017 WL 1405326 (N.D. Ga. Apr. 20, 2017)**

***Molina v. Wells Fargo Bank, Nat'l Ass'n*, No. 2:16-cv-207-DN, 2017 WL 1184047 (D. Utah Mar. 29, 2017)**

***Chevalier v. Metro Utils. Dist.*, 900 N.W.2d 565 (Neb. App. 2017)**

E. Qualifying Exigency Due to a Call to Military Service

1. Covered Military Members

2. Qualify Exigency

a. Short Notice Deployment

b. Military Events and Related Activities

c. Childcare and School Activities

i. Leave to Arrange for Alternative Childcare

ii. Leave to Provide Childcare on an Urgent Basis

iii. Leave to Enroll in or Transfer to a New School or Daycare Facility

iv. Leave to Attend Meetings with School or Daycare Staff

d. Financial and Legal Arrangements

e. Counseling

f. Rest and Recuperation

g. Post-Deployment Activities

h. Additional Activities

3. Eligible Family Relationships

F. Care for a Covered Servicemember with a Serious Injury or Illness

1. Covered Servicemembers

2. Serious Illness or Injury

3. Eligible Family Relationships

4. Relationship to Leave to Care for a Family Member with a Serious Health Condition

III. Serious Health Condition

Summarized elsewhere:
***McQuillen v. Petsmart, Inc.*, No. 15 C 9953, 2017 WL 661586 (N.D. Ill. Feb. 16, 2017)**

A. Overview

Summarized elsewhere:
B. Inpatient Care

Summarized elsewhere:
***Chipman v. Cook*, No. 3:15-CV-143 KGB, 2017 WL 1160585 (E.D. Ark. Mar. 28, 2017)**

C. Continuing Treatment

Summarized elsewhere:
***Chipman v. Cook*, No. 3:15-CV-143 KGB, 2017 WL 1160585 (E.D. Ark. Mar. 28, 2017)**

1. Incapacity for More Than Three Consecutive Calendar Days and Continuing Treatment by a Health Care Provider

***King v. Mestek, Inc.*, No. 3:15-cv-30071-MAP, __ F. Supp. 3d __, 2017 WL 4125253 (D. Mass. Sept. 18, 2017)**

Employee, an Assistant Controller in employer's Finance Department, brought suit against employer for discrimination on the basis of real or perceived disability, interference – retaliation by termination – with her rights under the FMLA, and harassment. Employer

requested summary judgment on all counts. The court allowed the motion for summary judgment in part.

In response to the disability discrimination count, employer argued that there was no evidence that employee had a disability or that she was perceived by her supervisors or co-workers as having one. Further, employer argued that even if employee had a disability, she could not prove she was terminated because of her disability. Employer maintained that employee was terminated as part of a restructuring of the Finance Department. The court found that the record sufficiently showed that employee had a disability. The court reasoned that employee's medical condition, Complex Regional Pain Syndrome, caused her severe pain while walking, required crutches with a walking air cast, and required medical leave for surgery. Further, the causal relation between employee's disability and termination was too close a call for a summary judgment determination.

In response to the retaliation count under the FMLA, employer argues that employee could not show that she was terminated in retaliation for taken FMLA leave. The court found that there was sufficient evidence for a jury to reasonable conclude that a causal link existed between the protected activity and the adverse job action. The court reasoned that employee worked full time for the employer for two years and had FMLA rights. After taking FMLA leave for the second time in a relatively short time frame, employee was terminated almost immediately.

Lastly, the court found that employee's harassment, relying on a hostile work environment theory, was insufficient to establish that the work environment was "permeated with…intimidation, ridicule, and insult…." The court reasoned that isolated incidents, such as the supervisor's conduct – silent treatment – and co-worker's "hurtful" email, did not amount to discriminatory changes in the terms and conditions of employment. Employee would have had to prove the incidents were extremely serious.

Bonnen v. Coney Island Hosp., No. 16 CV 4258 (AMD) (CLP), 2017 WL 4325703 (E.D.N.Y. Sept. 6, 2017)

Employee filed a *pro se* suit against her employer, a hospital, on a variety of bases, all stemming from the hospital's insistence that she wear a disposable lab coat – to which she claimed she was allergic – and her subsequent termination for absenteeism. Among employee's claims were FMLA claims for interference and retaliation. On employer's motion to dismiss, the court held that, even construing the *pro se* complaint broadly, employee failed to plead facts to establish that she suffered from a serious medical condition that would entitle her to FMLA leave. There was no indication that employee ever received inpatient care or that she was subject to continuing treatment by a healthcare provider.

a. Incapacity for More than Three Calendar Days

Summarized elsewhere:
Van Allen v. Print Art Inc., No. CV 15-5983 (RMB/AMD), 2017 WL 1356317 (D.N.J. Apr. 11, 2017)

b. Continuing Treatment

***Pollard v. N.Y. Methodist Hosp.*, 861 F.3d 374 (2d Cir. 2017)**

Employee, Jacintha Pollard, who was dismissed from employment by employer, The New York Methodist Hospital for taking unauthorized leave, appeals from an order granting summary judgment in favor of employer. Employee worked as a medical records file clerk for thirteen years, during which she developed a growth on her foot that had to be removed. She visited a doctor, who gave her the option of either conservative treatment or surgery. Employee opted for surgery. She requested medical leave nine days before the surgery. Employer denied the request, stating that thirty days advance notice was required where foreseeable. Employer did not request employee submit to an exam by employer's doctor. Employee went forward with the operation. Employer terminated her employment when she failed to report to work during her period of recuperation. Employee sued, seeking reinstatement and damages. The district court granted employer's summary judgment motion, ruling that employee's medical condition was not "serious" because employee did not require multiple treatments.

The court of appeals vacated the district court's ruling, holding that the lower court had too narrow of a definition for "treatment." The appellate court held that treatments after surgery qualify to establish whether a medical condition is "serious." The appellate court also held that employer was not estopped from challenging employee's entitlement to FMLA leave by virtue of not conducting its own medical examination of employee. 29 C.F.R. section 825.307(b)(1) provides that an employer "May require the employee to obtain a second opinion at the employer's expense." The court interpreted this as being permissive rather than mandatory.

Summarized elsewhere:
***Carle v. Red Thread Spaces, LLC*, No. 3:15-CV-01724 (JAM), 2017 WL 3994786 (D. Conn. Sept. 11, 2017)**

c. Treatment by a Health Care Provider

***Curtis v. Nucor Corp.*, No. 3:16CV00009 JLH, 2017 WL 583143 (E.D. Ark. Feb. 13, 2017)**

Employee sued his employer for FMLA interference and retaliation. Employee injured his knee while hunting away from home and instead of seeking immediate medical attention, drove home the following day. Employee was scheduled to be at work for a four-day shift two days later, but did not go to work, and instead called to notify his employer he could not come to work due to an injury. Employee did not actually receive medical treatment for his knee injury until nine days after the injury, and was diagnosed with "left knee pain" and was prescribed an anti-inflammatory medication employee had already been taking and instructed employee to wear a knee brace. Employee's doctor did not clear him to return to work until more than two months later, but noted he would not need a follow-up visit before then nor would he need more than one treatment visit per year for the injury. Employee drove from his doctor's office to his employer's mill to deliver the doctor's note excusing him from work from that date until more than two months later; however, the note did not excuse employee from the four days he missed between the date of the injury and the date of his doctor's visit. Employee was also observed walking from his car to Nucor's human resource office without the use of any assistance (crutches, cane, etc.). While at Nucor, employee completed FMLA paperwork that was faxed to his doctor, who certified the need for leave due to incapacity of "no use of left lower extremity"

with an onset date on the date of his doctor's visit. Because Nucor observed employee using his left leg, it scheduled a doctor's appointment for employee to obtain a second medical opinion. Employee refused to go and failed to show up for the appointment. Nucor then denied employee's FMLA leave request and later fired employee for his unexcused absences, pursuant to its attendance policy. The Arkansas district court, granting summary judgment for Nucor, held that because employee did not meet the treatment requirements for a serious health condition – he was not treated within seven days of his injury and did not receive treatment two or more times within thirty days of the injury – he could not establish he was entitled to FMLA leave.

2. Pregnancy or Prenatal Care

3. Chronic Serious Health Condition

***Isley v. Aker Philadelphia Shipyard, Inc.*, No. 16-1462, __ F. Supp. 3d __, 2017 WL 3534982 (E.D. Pa. Aug. 17, 2017)**

Employee sued employer for FMLA interference ad retaliation after he was terminated for attendance problems. Employer began termination proceedings for employee's accumulation of too many "no-pay absences," and employee requested that two of his unexcused absences be reclassified as protected leave under the FMLA. Employer rejected the request and followed through with the termination. After discovery, employer moved for summary judgment, and the district court granted employer's motion.

With respect to the interference claim, the court held that employee did not show that the two unexcused absences were because of a "serious condition," i.e., one that required him to receive "inpatient care" or "continuing treatment" under the FMLA. Accordingly, employee was not entitled to FMLA leave and thus had no basis upon which to bring an interference claim. With respect to the retaliation claim, the court explained that employee knew how to exercise his personal leave and could have done so before accumulating his no-pay absences. The court then held that the record did not support a finding that employer terminated employee's employment (or upheld his termination) because employee invoked a statutory right to leave.

Summarized elsewhere:
***Carlson v. Sexton Ford Sales, Inc.*, No. 4:15-cv-04227-SLD-JEH, 2017 WL 4273618 (C.D. Ill. Sept. 26, 2017)**

***Molina v. Wells Fargo Bank, Nat'l Ass'n*, No. 2:16-cv-207-DN, 2017 WL 1184047 (D. Utah Mar. 29, 2017)**

***Workneh v. Super Shuttle Int'l, Inc.*, No. 15 CIV. 3521 (ER), 2017 WL 1185221 (S.D.N.Y. Mar. 28, 2017)**

4. Permanent or Long-Term Incapacity

5. Multiple Treatments

D. Particular Types of Treatment and Conditions

1. Cosmetic Treatments

2. Treatment for Substance Abuse

***Carle v. Red Thread Spaces, LLC*, No. 3:15-CV-01724 (JAM), 2017 WL 3994786 (D. Conn. Sept. 11, 2017)**

Employee claims that employer violated the FMLA when it suspended and ultimately terminated him for failing to provide a negative drug test after initially testing positive. The court, however, held that a positive drug test and forced suspension does not entitle employee to the protections of the FMLA in the absence of an actual serous health condition that rendered him unable to perform the functions of his position. The court thus dismissed employee's case by summary judgment.

The court explained that the Second Circuit recognizes two types of FMLA claims: interference claims and retaliation claims. For an interference claim, employee must show: (1) he or she is an eligible employee under the FMLA; (2) employer is covered under the FMLA; (3) employee was entitled to take FMLA leave; (4) employee gave notice to employer of his intention to take leave; and (5) employee was denied benefits to which he or she was entitled under the FMLA. At issue in the case were the last three prongs. Employee would be entitled to take FMLA leave if he experienced a qualifying event enumerated in the FMLA. Among the qualifying events is a serious health condition, which is an illness, injury, impairment, or physical or mental condition that both involves continuing treatment by a health care provider and makes an employee unable to work (or prevents an employee from performing at least one of the essential functions, as the term is defined under the Americans with Disabilities Act). The court also explained that "substance abuse" can be a serious health condition when the leave is taken for treatment for substance abuse by a healthcare provider. And along with this substance abuse or treatment incapacitating the employee for more than three days, the employee must also undergo treatment by a healthcare provider on at least one occasion, coupled with a regimen of continuing treatment under the supervision of a healthcare provider.

The FMLA, however, does not prevent an employer from terminating an employee, even if the employee is taking FMLA leave at the time. Put differently, although the FMLA provides protection to an employee for receiving treatment for substance abuse, the FMLA denies protection to an employee for mere use of a prohibited substance. And neither the use of a prohibited substance nor the presence of it in an employee's body constitutes substance abuse under the FMLA. In employee's case, contrary to his contention, he did not suffer from a serious health condition. The court also concluded that employee was not incapacitated within the meaning of the FMLA because he remained physically capable of working. And, employee's inability to work was not due to a serious health condition, treatment for a serious health condition, or recovery from a serious health condition. Rather, employee was unable to work because he was suspended until he could provide a negative drug test as required by employer's policy. That his employer prevented him from returning to work did not constitute an incapacity under the FMLA. Further, a single evaluation by a substance-abuse counselor coupled with follow-up or make-up drug tests that a healthcare provider subsequently examines do not constitute treatment by a healthcare provider coupled with a regimen of continuing treatment as required under the FMLA.

Summarized elsewhere:
***McQuillen v. PetSmart, Inc.*, 694 F. App'x 420 (7th Cir. 2017)**

3. “Minor” Illnesses

4. Mental Illness

CHAPTER 5.

LENGTH AND SCHEDULING OF LEAVE

I. Overview

II. Length of Leave

<u>*Green v. Orion Real Estate Servs., Inc.*, No. 4:16-CV-2575, 2017 WL 1710570 (S.D. Tex. May 3, 2017)</u>

Employee, a property manager, filed suit against her former employers for interference and retaliation under the FMLA. Employers granted employee twelve weeks of FMLA leave and informed employee that her FMLA leave would end on January 5, 2013. However, this was a miscalculation which was clarified on December 3, 2012 when employer informed employee that her leave would elapse on December 5, 2012. Employee claimed her employers interfered with her FMLA rights by refusing to grant her entire request for leave. Employee claimed that her employers retaliated against her for exercising her FMLA rights by demoting her, refusing to restore her to her prior position, and terminating her.

Defendants filed a motion to dismiss. However, because defendants attached ten exhibits to their motion to dismiss under Rule 12(b)(6), the district court in Texas converted it into a motion for summary judgment under Rule 56. Regarding employee’s FMLA interference claim, the district court found that although employers did not grant all of the leave requested by employee, they provided the twelve weeks required under the statue and granted summary judgment. Regarding employee’s FMLA retaliation claim, the district court denied summary judgment because employers did not proffer any evidence to dispute employee’s allegations that she was demoted and terminated in retaliation for her exercise of FMLA rights.

<u>*Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)</u>

Employee, a retired teacher, brought an FMLA interference and retaliation claim against her former employer, defendant Jefferson County Board of Education, after she retired on disability. Employee sought (1) lost wages and benefits, (2) compensatory damages, (3) punitive damages for violations of the ADA, (4) liquidated damages for violations of the FMLA, (5) pre- and post-judgment interest, and (6) costs and fees. Defendants moved for summary judgment on all counts; the Western Northern District of Kentucky granted the motion.

Under the FMLA, eligible employees are allowed up to twelve weeks of leave in a 12-month period. Here, employee requested and was granted leave for approximately forty-two consecutive weeks. Employee argued that employer interfered with her rights and benefits under FMLA because upon her return, employer assigned her to teach the eighth grade rather than her preferred third grade. The court held that employee failed to show that employer denied her FMLA benefits or interfered with her FMLA rights. Therefore, employee’s argument failed as a matter of law and employer was entitled to summary judgment.

Regarding the retaliation claim, employee alleged that employer transferred her to its middle school as a pretext for taking an extended FMLA leave. In opposition, employer demonstrated that it offered to employee a position to teach the first grade. After employee rejected the offer, employer offered to employee a position to teach at the middle school. The court reasoned that employee failed to show a causal connection between her taking FMLA leave and her transfer to the middle school. Therefore, summary judgment was granted.

Summarized elsewhere:
***Keys v. Monument Chem. Ky., LLC*, No. 3:15-cv-645-DJH, 2017 WL 2196751 (W.D. Ky. May 18, 2017)**

A. General

B. Measuring the 12-Month Period

C. Special Circumstances Limiting the Leave Period

1. Birth, Adoption, and Foster Care

2. Spouses Employed by the Same Employer

D. Effect of Offer of Alternative Position

Summarized elsewhere:
***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

E. Required Use of Leave

F. Measuring Military Caregiver Leave

III. Intermittent Leaves and Reduced Leave Schedules

Summarized elsewhere:
***Perry v. Covenant Med. Ctr. Inc.*, No. 15-CV-11040, 2017 WL 588456 (E.D. Mich. Feb. 14, 2017)**

A. Entitlement to Take Intermittent Leaves or Leaves on a Reduced Schedule

Summarized elsewhere:
***Perry v. Covenant Med. Ctr. Inc.*, No. 15-CV-11040, 2017 WL 588456 (E.D. Mich. Feb. 14, 2017)**

B. Eligibility for and Scheduling of Intermittent Leaves and Leaves on a Reduced Schedule

***Dulany v. Brennan*, No. 16-CV-149-JHP-FHM, 2017 WL 991070 (N.D. Okla. Mar. 14, 2017)**

Employee worked for the United States Postal Service until resigning after 19 years of service. She took two FMLA leaves, one to care for her mother in June 2014 and the other for herself in April 2015. After having those leaves approved, employee receive disciplinary

warnings in October 2015 and January 2016 related to failure to attend work as directed, leaving early or reporting late to work, and failure to respond to a letter inquiring whether an absence was an FMLA-qualifying leave. She resigned several months later and sued employer for violations of FMLA's interference and retaliation provisions. The court granted employer's motion for summary judgment on both claims.

The court held that employee's interference theory lacked merit because employer never denied any of her requests to take FMLA leave. It first rejected her view that employer was obligated to honor her doctor's request for her to take two consecutive days off and ruled that providing her one day of FMLA leave during her regularly scheduled six-day workweek was sufficient. It explained that the FMLA "does not require an employer to provide an employee a schedule of their choice" and that an employee is not entitled to leave in any situation which employer would not provide such leave. The court granted summary judgment on employee's second interference claim alleging discipline she received for taking a near month-long absence in December 2015 violated FMLA. This was because employee refused to answer an inquiry in a letter employer sent her as to whether her absence was related to FMLA. Her failure to do so resulted in her leave as one that was unexcused for that period of time and not one qualified under FMLA.

Summary judgment was appropriate on her retaliation claim because employee could not establish any adverse employment action from the disciplinary notices she was issued since she was not terminated or demoted or lose any pay or status. Employee, in particular, could not make out a *prima facie* case of retaliation because the more than one-year period between her first FMLA request in April 2014 and her disciplinary notices in October 2015 and January 2016 were too far temporally apart to support her retaliation claim. Even if she could maintain a *prima facie* showing of retaliation, she could not demonstrate that employer's reliance on her unexcused December 2015 absence was pretextual because temporal proximity alone is insufficient for an employee to carry his or her burden pretext. The only evidence that employee could adduce at the pretext stage was her belief that employer's above-referenced reason was retaliatory. Because this was insufficient to create an issue for trial, the court dismissed her retaliation claim.

The court also held that employee could not prove that she suffered any damages under FMLA. FMLA only authorizes recovery of wages, salary, employment benefits or other monetary losses sustained as a result of a violation of the statute. Because employee did not suffer economic loss of any kind, her FMLA claim failed for this reason as well.

C. Measuring Use of Intermittent Leaves and Leaves on a Reduced Schedule

D. Transferring an Employee to an Alternative Position to Accommodate Intermittent Leave or Leave on a Reduced Schedule

Summarized elsewhere:
***Bolek v. City of Hillsboro*, No. 3:14-CV-00740-SB, 2017 WL 627218 (D. Or. Feb. 13, 2017)**

1. Standards for Transfer

2. Equivalent Pay and Benefits

3. Limitations on Transfer

E. Making Pay Adjustments

1. FLSA-Exempt Employees Paid on a Salary Basis

2. FLSA-Nonexempt Employees Paid on a Fluctuating Workweek Basis

3. Exception Limited to FMLA Leave

IV. Special Provisions for Instructional Employees of Schools

A. Coverage

B. Duration of Leaves in Covered Schools

C. Leaves Near the End of an Academic Term

Summarized elsewhere:
***Davidson v. Evergreen Park Cmty. High Sch. Dist. 231*, No. 15 C 0039, 2017 WL 2243096 (N.D. Ill. May 23, 2017)**

CHAPTER 6.

NOTICE AND INFORMATION REQUIREMENTS

***Sine v. Rockhill Mennonite Home*, No. 17-0043, __ F. Supp. 3d __, 2017 WL 3172721 (E.D. Pa. July 26, 2017)**

Employee Michele Sine brought FMLA retaliation and interference claims against her former employer, Rockhill Mennonite Home, following her termination. Employee alleged she was terminated from her position as a floor technician for requesting leave under the FMLA. Employer moved to dismiss employee's FMLA claims. Employer asserted employee was not an eligible employee under the FMLA because she made her request for leave before she had worked for employer for twelve (12) months.

The court denied employer's motion to dismiss, holding that that while employee requested leave before she had been employed for twelve months, her leave would not have started until after she had been an employee for twelve months. It noted that the FMLA protects pre-eligible employees who provide notice of their intent to take FMLA leave when they become eligible. Employee therefore qualified as an eligible employee to bring an FMLA claim and had in all other respects properly alleged FMLA interference and retaliation claims.

Summarized elsewhere:
***Taulbee v. Univ. Physician Grp.*, No. 16-10807, 2017 WL 3169241 (E.D. Mich. July 26, 2017)**

I. Overview

II. Employer's Posting and Other General Information Requirements

***Antoine v. Amick Farms*, No. CV ELH-16-2444, 2017 WL 68646 (D. Md. Jan. 6, 2017)**

Four employees – a sanitation employee and three meat processing employees – not literate in English, alleged that, *inter alia*, employer, a farm, had failed to provide notice of their FMLA rights and eligibility to them in any language. Employer moved to dismiss the notice claim, asserting that there is no private right of action to enforce the general notice requirement of the FMLA as set forth in 29 U.S.C. § 2619 and 29 C.F.R. § 825.300(a).

The district court granted the motion to dismiss the notice claim. It noted that the language of 29 U.S.C. § 2619 establishes that the penalty for failure to post a general FMLA notice is a civil penalty not to exceed $100 for each separate offense, and noted further that a number of other district courts had found that private damages for a willful violation of the notice requirements were not authorized by statute. The court further determined that deference to the Department of Labor regulations interpreting the FMLA was appropriate, and noted that the regulations, including those at 29 C.F.R. § 825.402, did not indicate the existence of a private right of action to enforce the general notice requirements of the FMLA. The court distinguished between the limited remedies available for an employer's failure to comply with the general notice requirements of the FMLA with the potential FMLA interference claim that could arise from an employer's failure to comply with the individualized notice requirements of the statute.

A. Posting Requirements

B. Other General Written Notice

Summarized elsewhere:
***Quintiliani v. Concenctric Healthcare Sols., LLC*, No. 1 CA-CV 15-0816, 2017 WL 4288032 (Ariz. App. 1st Div. Sept. 28, 2017)**

C. Consequences of Employer Failure to Comply with General Information Requirements

Summarized elsewhere:
***Cleveland v. Jefferson Cnty. Bd. of Educ.*, No. 2:15-cv-01538-JEO, 2017 WL 1806826 (N.D. Ala. May 5, 2017)**

III. Notice by Employee of Need for Leave

***McQuillen v. PetSmart, Inc.*, 694 F. App'x 420 (7th Cir. 2017)**

Employee brought suit against his former employer for interference under the FMLA. The United States District Court for the Northern District of Illinois granted employer's summary judgment motion, and employee appealed. Employee was terminated under employer's job abandonment policy after missing consecutive days without providing notice. On his second missed day, employer called employee's home phone, and his wife informed employer that employee was in bed, drunk, and unconscious. A few days after his termination, employee was treated for major depressive disorder, anxiety disorder, and alcoholism – conditions with which he had previously been diagnosed, but which he never disclosed to employer.

In granting employer's summary judgment motion, the district court found first that substance abuse justifies FMLA leave only if it is being treated, which it was not until employee was hospitalized, and second that employee did not request FMLA leave. On appeal, the Seventh Circuit was not persuaded by the district court's first reason because employee's medical problems were not limited solely to substance abuse. The court, however, agreed with the district court that employee did not give the requisite notice. Employee argued that an unconscious person cannot give notice, but the court noted that he could have informed the employer of his medical issues beforehand, but failed to do so. Therefore, the court affirmed the district court's decision on the basis that simply knowing an employee did not show up to work for multiple days and was drunk at home "would not have suggested to a reasonable employer either a request or a need for FMLA leave to treat major depression."

***Chatila v. Scottsdale Healthcare Hosps.*, 701 F. App'x 639 (9th Cir. 2017)**

Employee brought suit for a violation of her rights under the FMLA. The district court granted employer Scottsdale Healthcare Hospital's motion for summary judgment on employee's claims under the FMLA, ADA, and Rehabilitation Act of 1973. Employee appealed the district court's decision. The United States Court of Appeals reversed the judgment as to employee's FMLA claim and remanded the claim back to the district court.

The court found that a prior email and handwritten wrote by employee to her supervisor created a triable issue of fact regarding whether employee requested FMLA leave before her purported resignation. In addition, the court held that employee raised triable issues of fact regarding whether employer interfered with her right to take leave under the FMLA. The court found that employee's supervisor did not inquire further upon receipt of employee's email or note whether employee had requested FMLA leave and a reasonable jury could find that the failure to do so interfered with employee's attempt to exercise her rights under the FMLA. Furthermore, the court found that a reasonable juror could interpret statements that employee's supervisor made, that employee was "putting bombshells in between every week" when he was "trying to make a cohesive clean working schedule" as a reference to employee's request for FMLA leave.

***Alexander v. Kellogg*, 674 F. App'x 496 (6th Cir. 2017)**

Employee production operator alleged, *inter alia*, claims of interference and retaliation under the FMLA in connection with employer's termination of his employment for excessive unexcused absences. Employer maintained a call policy requiring employees to notify employer, using a call service, of their intention to be absent at least two hours before their scheduled start time, as well as a policy requiring that employees who utilize approved intermittent FMLA leave contact employer's third party FMLA program administrator, by telephone or online, within 48 hours of missing work pursuant to FMLA leave. Employer approved employee's use of intermittent FMLA leave for a number of time periods. When employee utilized FMLA leave, he notified employer of his absence but, on a number of occasions, failed to timely notify the FMLA program administrator of his use of FMLA leave, resulting in his accrual of several unexcused absences and his subsequent termination. Employer moved for summary judgment on employee's FMLA claims, which the district court granted.

The court of appeals affirmed the decision of the district court. With regard to employee's FMLA interference claim, the court found that employee had failed to state a *prima*

facie case, as the factual record clearly indicated that employee had failed to notify employer of his intention to utilize FMLA leave on the dates at issue despite having been reminded by management to do so. On employee's FMLA retaliation case, the court of appeals found that, with regard to the dates giving rise to employee's termination for excessive unexcused absences, employee had failed to request FMLA leave by failing to contact the program administrator. The court held that, therefore, employee had not exercised a right under the FMLA for purposes of a claim for retaliation and had not satisfied the elements of a *prima facie* FMLA retaliation claim.

***Feliciano v. Coca-Cola Refreshments USA, Inc.*, No. CV 17-942, __ F. Supp. 3d __, 2017 WL 6391474 (E.D. Pa. Dec. 13, 2017)**

Employee worked for employer as a shipping and receiving clerk. In June 2016, employee sent emails to her manager regarding "unacceptable and offensive treatment" from other employees. In August, she took FMLA leave. In October, she filed a complaint against employer with numerous causes of action, including FMLA interference and retaliation. Employee did not allege specific facts showing she was eligible for FMLA leave, but employer did not move to dismiss on this ground. Rather, employer maintained that employee was not denied benefits because she was eventually granted FMLA leave, and employee did not allege facts showing that she provided employer with adequate notice. The court stated that employee, by alleging that her supervisor denied a request for blocks of time to make medical appointments, had adequately pleaded that she was denied "intermittent" leave as outlined in the FMLA. While an employee is required to provide an employer with sufficient notice that she is using leave under the FMLA in order to invoke its protections, an employee can satisfy her notice obligation without expressly asserting or even mentioning her rights under the FMLA and without providing enough detailed information to know if the FMLA actually applies. If the employer does not have enough information about the reason for an employee's use of leave, the employer has the obligation to determine whether the leave potentially qualifies under the FMLA. The court said that at this stage, employee had plausibly alleged that her request for time away from work to attend her medical appointments reasonably notified employer that the FMLA might apply. The court denied employer's motion to dismiss employee's FMLA interference claim but granted its motion to dismiss employee's FMLA retaliation claim, explaining that employer's denial of benefits did not qualify as an adverse employment action.

***Percell v. Commw. of Ky. Dep't of Military*, No. 3:16-CV-721-TBR-LLK, 2017 WL 6347973 (W.D. Ky. Dec. 12, 2017)**

Employee worked for employer as an administrative assistant for 17 years. In 2016, Commandant Michael Major, who had no supervisory authority over employee, complained to the Deputy Director that employee had been "insubordinate." Later that year, employee learned that her husband required a lung transplant, to be performed at a facility in Pittsburgh, Pennsylvania. While working over the weekend, after having been out of work for a couple of days, she told Major she would need to take some time off due to her husband's lung transplant procedure in Pittsburgh and she would discuss it further with him on Monday, when the director was present. Three days later, the director terminated employee for what employee deemed "minor occurrences" that, according to employee, took place one year prior, were out of employee's control, and were never brought to employee's attention. Employee filed an action against employer, claiming that employer interfered with her FMLA rights by discharging her before she could exercise those rights. Employer filed a motion to dismiss, contending that employee failed to allege two of the elements of an FMLA interference claim: (1) That she was

entitled to leave under the FMLA, and (2) that she gave employer notice of her intention to take leave. The court disagreed, stating that (1) the FMLA entitled an eligible employee to take leave to care for a spouse suffering from a serious health condition (such as a lung ailment requiring a transplant), and (2) the employee need not expressly assert rights under the FMLA or even mention the FMLA but only state FMLA leave was needed. If employer could show a legitimate, nondiscriminatory reason why employee was terminated, then employee's FMLA interference claim would fail. The court said that at this stage of the litigation, the pleaded facts allowed for a reasonable inference that employee's request for leave, three days prior to her termination, was at least a negative factor in employer's decision to discharge her. Employee's FMLA claim survived employer's motion to dismiss.

***White v. Smiths Med. ASD, Inc.*, No. 3:15-cv-01501-VLB, 2017 WL 4868556 (D. Conn. Oct. 27, 2017)**

Employee worked as a manufacturing team leader for employer. In 2009, his performance began to decline, and he acknowledged at his annual review that he understood that his performance was not meeting employer's standards. Employee's performance continued to decline, and in January 2014, employer placed him on a performance improvement plan. In May 2014, employer issued a follow-up of the performance improvement plan, noting that employee improved in some categories but continued to slip on others, and employer extended the plan until the end of July. Meanwhile, employee received a cortisone injection for chronic back pain. In October 2014, employee sent a one-sentence email to his supervisor to inform him that he would be undergoing surgery the following month. Later that month, employer terminated employee for his continued poor performance. Employee brought both interference and retaliation claims under the FMLA, and employer moved for summary judgment.

With respect to the interference claim, the court found that the evidence did not show that employee provided sufficient notice to employer that he qualified for FMLA benefits, nor did it show that he was denied benefits to which he was entitled under the FMLA. The court found that employee did not provide adequate notice to employer because employee only informed employer that he would require surgery, but indicated neither the type of surgery to be performed nor the duration of the surgery or length of time for recovery, and thus it would be reasonable for employer to conclude that the surgery was minor and did not require FMLA leave. The court also found no proof that employee was denied benefits to which he was entitled because employee was aware of the proper procedures for requesting leave, yet he failed to do so. In addition, employee testified that employer had advised him to get a doctor's note and let employer know. Although employee argued that he was terminated prior to having the opportunity to request leave through the proper channels, the court found this argument unavailing because employee had had ample time to schedule FMLA leave prior to his termination.

With respect to the retaliation claim, the court found that employee failed to establish a *prima facie* case; he did not exercise rights protected under the FMLA because he failed to provide either actual or constructive notice of his qualification for or intent to take FMLA leave. And even if he had established that element, the court found that employer established a legitimate, non-discriminatory reason for termination: employee's poor performance dating back to 2009. Accordingly, the court found no triable issue of fact as to either FMLA claim, and it granted summary judgment for employer.

***Alcegaire v. JBS USA, LLC*, No. 3:15-cv-266-DJH-CHL, 2017 WL 4288882 (W.D. Ky. Sept. 27, 2017)**

Former employee filed FMLA interference claim after she was terminated for her failure to provide documentation for her absences. Employer moved for summary judgment which was granted.

Employee had failed to call in her absences, prompting JBS to have three meetings with her to address her unexcused absences. JBS fired her after she still failed to call in her absences, citing failure to comply with the company's attendance policy. Employee claimed interference with her FMLA rights. JBS contended she was not entitled to FMLA leave because she did not have a serious health condition, and that her claim failed as a matter of law due to her noncompliance with the company's notice and procedural requirements for attendance.

Employee's doctor had told her she could do her meat cutter work, although on a modified sit-down basis. The court cited *Whitworth v. Consol Biscuit Co.,* 2007 U.S. Dist. LEXIS 25971 (E.D. Ky. Apr. 6, 2007) that the possibility that a person can work removes FMLA protection. The court further noted that FMLA regulations, 29 C.F.R. §825.302(d), provide that "[w]here an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave May be delayed or denied." The court held that employee's failure to comply with JBS's call-in requirements was fatal to her FMLA interference claim.

***Morrow v. AI-Cares, LLC*, No. 2:17-cv-10057, 2017 WL 3215206 (E.D. Mich. July 28, 2017)**

Employee brought suit against employer for retaliation and interference under the FMLA. On August 10, 2016, employee injured his knee at work. The next day his doctor provided him with a note excusing him from work until August 15, 2016. However, when he returned to work, employee complained he was still in pain. Employer sent him for a follow-up appointment where the doctor allowed him to return to work with some restrictions lasting until August 19, 2016. Employee alleged he gave that doctor's note to his supervisor who told him he could not accommodate his restrictions. Employer contended employee did not provide a doctor's note, and that employee's version of events could not have happened because he never returned to work after his doctor's visit. Furthermore, employee and employer agreed that he called in sick between August 16, 2016 and August 19, 2016, but disputed the nature of the calls. Employee alleged he told employer he was absent because his supervisor told him there was no available work for him and inquired about whether there was another job in the plant he could perform. But employer contended employee voluntarily resigned on August 17, 2016 and called the next two days asking for his job back.

Employer moved to dismiss for failure to state a claim, or alternatively, summary judgment. After deciding that this matter should properly be resolved on summary judgment, the district court denied employer's motion, finding that triable issues of fact existed as to whether employee resigned, and whether he provided proper notice of his intent to take FMLA leave.

***Hannah P. v. Coats*, No. 1-16-cv-1030, 2017 WL 3202726 (E.D. Va. July 27, 2017)**

Employee, who suffered from clinical depression, filed suit alleging, among other things, that employer interfered with and retaliated against her for using leave under the FMLA. The district court granted summary judgment, finding that employee neither requested nor put her

supervisors on notice that her leave would be for an FMLA-qualifying reason. Rather, she had merely asked for four weeks of annual leave. Moreover, the doctor's notes simply said that she be permitted to take leave to "cope with burnout," and employee had said that she could come to work if "something important came up." The district court also found that employee could not establish a retaliation claim.

***Davidson v. Evergreen Park Cmty. High Sch. Dist. 231*, No. 15 C 0039, 2017 WL 2243096 (N.D. Ill. May 23, 2017)**

Employee, a teacher, brought suit against his former employer, a high school district, alleging that it violated the FMLA by (1) denying him FMLA leave from August 19-22, 2014, and (2) terminating his employment after he was ultimately given – and took – several weeks of FMLA leave, from September 2014 through January 2015. Employer moved for summary judgment.

In May 2013, employee had been placed on a professional development plan ("PDP") after he received a performance evaluation rating of "needs improvement" for the 2012-2013 school year. At the conclusion of the PDP in March 2014, employee's performance was deemed "unsatisfactory," and he was placed on a formal 90-day remediation plan. In April 2014, employee was told that he would need to begin providing medical certificates supporting any sick leave requests due to the significant number of sick and personal days that employee had taken; employee took no further sick days during the 2013-2014 school year.

After calling in sick for a "serious family health emergency" on August 19 and 20, 2014, employee was asked to provide a doctor's letter to employer. On August 22, employee provided a doctor's letter, from which the district concluded that employee's wife's medical condition was not serious and did not qualify for FMLA leave. Employer granted employee's request for FMLA leave on September 9, 2014, after employee provided the additional information requested by employer. Employer exercised its right under the FMLA to extend employee's leave until the beginning of the new semester, through January 5, 2015, in order to limit classroom disruption. On April 1, 2015, the school board voted to terminate employee's employment after a final, unsatisfactory performance evaluation on March 20, 2015.

The court granted summary judgment on employee's first allegation, denial of FMLA leave. Though an employee need not expressly mention the FMLA in his leave request, the Seventh Circuit has emphasized that an employee must alert his employer to the seriousness of the health condition when requesting leave; merely using vague words like "serious" and "urgent" are insufficient. Accordingly, as a matter of law, the court found that employee did not provide sufficient notice to employer that his wife suffered a serious medical problem when he requested leave in August 2014. The court also granted summary judgment as to employee's second allegation, finding that undisputed evidence indicated that employee was terminated because he failed to remediate his unsatisfactory job performance during a three-year evaluation and remediation period, not as retaliation for taking FMLA leave.

***Keys v. Monument Chem. Ky., LLC*, No. 3:15-cv-645-DJH, 2017 WL 2196751 (W.D. Ky. May 18, 2017)**

Employee filed FMLA interference and retaliation claims against employer, claiming he was terminated in retaliation for taking FMLA leave for a wrist injury. Employee worked for

employer as a Production Shift Supervisor. Employee was out of work for several months in late 2013, on workers compensation leave, due to an ankle injury. After reinjuring the ankle, he was out of work for several months in early 2014. During 2014, employee took various sick and personal days off. In late 2014, even having exhausted his sick leave, employee took two more sick days off. On November 24, 2014, human resources met with him to discuss his attendance issues. Employee explained his absences were caused by frequent illnesses and having to take his wife, who had lupus, and daughter, who had multiple sclerosis, to medical appointments. Employee was warned to improve his attendance or else risk losing his job. Shortly after this meeting, employee was granted short-term medical leave and missed several days of work due to a non-work-related knee injury. In January 2015, employee injured his wrist at home. Employee returned to work for several days with restrictions prior to wrist surgery on February 5, 2015. Employee was granted FMLA leave for the surgery and recovery. With the exception of one day of offsite training for which he was released by his doctor and permitted to attend, this surgery kept employee out of work for 13 weeks until May 11, 2015. On June 12, 2015, he missed work due to reported wrist pain. On June 18, 2015, he was out of work for a doctor visit. On July 2, 2015, he was terminated for excessive absenteeism.

Employee asserted his absences were covered by employer's leave and absence policies. According to employee, his absences were due to illness, medical appointments, and funeral leave and were covered by a combination of his personal days, sick days, vacation days, FMLA leave, "comp" days, and shift-trading. He contended that the only day he was absent that was not scheduled off in advance as a vacation or personal/sick day following his return from FMLA leave in May 2015 was June 12, 2015.

The court said employee had met his burden for establishing a *prima facie* retaliation case, including the temporal proximity between his return from FMLA leave and termination. Employer stated its legitimate, nondiscriminatory reason for terminating employee was excessive absenteeism. It had warned employee about excessive absenteeism prior to his FMLA leave and followed through on its warnings. Employee claimed employer's reason for terminating him was pretextual. He said his days off in June 2015 were covered by employer's policies regarding FMLA leave. But even if he had exhausted his FMLA leave, he had at least four personal/sick days and 23 vacation days available. The court, citing this argument and employer's common practice of shift-trading, stated there were genuine disputes of material fact as to whether employer's reasons for termination had been pretextual. The court denied summary judgment on the retaliation claim. With respect to the interference claim (employee alleged employer had punished employee for his June 18, 2015 doctor visit), the court said there was no evidence that employee had requested June 18 off as an FMLA day and granted summary judgment on the interference claim.

***Powers v. Covestro LLC*, No. 2:16-cv-05253, 2017 WL 1952230 (S.D. W.Va. May 10, 2017)**

This case arose on summary judgment before the United States District Court for the Southern District of West Virginia. Employee was employed by employer from June 2013 until July 2014. Nine months into his employment, employee was diagnosed with kidney stones. Employee told his coworkers and supervisor about his discomfort with his kidneys and that he was urinating blood, but told them that it was nothing he was seriously concerned about. Employee never requested time off for his kidney stones and continued to work regularly. Two months after visiting his family doctor about the kidney stones, he was scheduled to work a shift on July 19, 2014, during which he also wanted to attend a stock car race. Employer refused to

grant time off to employee, but he called into work that afternoon, stating he was not feeling well. Employee went to the race instead of going to work. Employer believed that employee had feigned illness, and it disciplined him with a three day suspension. He was also found to have been sleeping on the work premises, and was fired for this offense. Within about two weeks of his termination, employee was diagnosed with bladder cancer. He sued alleging violations of the FMLA.

Employer filed a motion for summary judgment asserting that it had not violated the FMLA because it did not know that employee required a leave; employee filed a motion for summary judgment, asserting that employer had interfered with his FMLA rights. The court found that employee failed to adduce sufficient evidence to support a FMLA interference claim because he failed to provide employer with notice sufficient to alert the company that the FMLA might apply. Employee admitted that he never requested time off for medical treatment, and the court found insufficient employee's phone call to employer merely stating that he was not feeling well. "An employee does not alert his or her employer that he or she has a severe health condition by merely calling into work and vaguely stating that he or she does not feel well." Employer's mere knowledge that employee had previously complained about kidney stones was insufficient to alert employer that employee might have a serious health condition, especially where the "employee never requested time off for his condition and continued to work normally." The court denied employee's motion and granted employer's motion.

***Workneh v. Super Shuttle Int'l, Inc.*, No. 15 CIV. 3521 (ER), 2017 WL 1185221 (S.D.N.Y. Mar. 28, 2017)**

Employee brought suit under 29 U.S.C. § 2601 alleging interference under the FMLA. The district court decided this issue on employer's motion to dismiss, and granted the motion. Employee failed to allege that he suffered from a serious health condition or facts sufficient to establish that employer had adequate notice of employee's need for leave. The district court held that photocopies of the medications that were prescribed and a doctor's excuse to stay home for three weeks were not sufficient to put employer on notice of a serious medical condition.

Summarized elsewhere:
***Sine v. Rockhill Mennonite Home*, No. 17-0043, __ F. Supp. 3d __, 2017 WL 3172721 (E.D. Pa. July 26, 2017)**

***Bailey v. Quest Diagnostics, Inc.*, No. 1:17-CV-625, 2017 WL 6524950 (E.D. Va. Dec. 19, 2017)**

***English v. Estes Express Lines*, No. 516CV01353CASSKX, 2017 WL 5633037 (C.D. Cal. Nov. 21, 2017)**

***Nekich v. Wis. Cent. Ltd.*, No. 16-CV-2399 (JNE/DTS), 2017 WL 5591600 (D. Minn. Nov. 17, 2017)**

***McKinley v. Rapid Global Bus. Solutions, Inc.*, No. 1:17-cv-00621-LJM-MJD, 2017 WL 3173058 (S.D. Ind. July 26, 2017)**

***Taulbee v. Univ. Physician Grp.*, No. 16-10807, 2017 WL 3169241 (E.D. Mich. July 26, 2017)**

***Taylor v. J.C. Penney Co., Inc.*, No. 16-cv-11797, 2017 WL 1908786 (E.D. Mich. May 10, 2017)**

A. Timing of the Notice and Leave

***Hair v. Fayette Cnty. of Pa.*, 265 F. Supp. 3d 544 (W.D. Penn. 2017)**

Employee brought an action in the Western District of Pennsylvania alleging her former employer interfered with her exercise of rights under the FMLA by discouraging her from using such leave. The parties filed competing summary judgment motions. When employee was granted intermittent FMLA leave, employee was required to call-in prior to her start time to inform employer whether she would be coming to work that day, and if so, her approximately arrival time. Employee contends that this is a higher burden than the notice requirements required by the FMLA.

The court found her leave was unforeseeable and employee was required to comply with employer's "usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." Thus, the notice requirements were compliant with the FMLA regulations. The court denied employee's partial summary judgment as to the FMLA interference claim, and granted employer's summary judgment as to the same.

***Keogh v. Concentra Corp.*, No. 16-CV-11460, 2017 WL 4618411 (E.D. Mich. Oct. 16, 2017)**

Employee worked as a doctor and manager, and then, after being demoted, as a float physician for employer healthcare services facility. During his employment in both capacities, he experienced an assortment of performance problems which included rude and disrespectful behavior, and tardiness.

These were documented in a Performance Improvement Plan ("PIP") which required him to correct his deficiencies within 30 days. While the PIP was later extended due to further performance issues, employer later closed out the PIP after employee met most of its conditions. When further performance issues surfaced, employer demoted employee from his managerial post to a "float" physician position. Employee's tardiness problems arose again after the PIP's closure, and employer issued him a Final Verbal Warning about those problems. Because his tardiness problems persisted, he was fired two weeks later. Within a week of his firing, employee had requested information about taking FMLA leave due to back injuries he was suffering from, but did not ask to take a leave for them. He sued employer for theories of interference and retaliation under the FMLA. The court granted employer's motion for summary judgment on both theories.

Employee failed to establish a *prima facie* case of interference because he did not sufficiently put employer on notice of his desire to take FMLA leave. While an employee seeking FMLA leave is not required to refer to the statute, he must convey enough information to his employer that he is requesting leave for a serious health condition that makes him unable to perform his job. Employee did not meet this requirement because he was only investigating the possibility of taking FMLA leave and did not either directly request leave or provide medical certification documenting his need for such leave. For this reason, he failed to create an issue for trial on whether he provided employer adequate notice for FMLA leave. Neither did employee raise a disputed issue of fact that employer's reason for terminating him, which included numerous and well-documented ongoing and behavioral issues, was pretextual. Employee never

offered any evidence rebutting that his termination was occasioned by anything other than his post-Final Warning tardiness issues. In addition, employer offered employee ample opportunity to improve his work performance and employee could not link any of the reasons for terminating him to his back problems.

Employee also failed to raise a material issue for trial on his retaliation theory. While employee was fired a few days after his inquiry into FMLA leave, temporal proximity standing alone is insufficient to establish causation. Because that was the only basis for his retaliation claim, summary judgment was appropriate. The court noted that he did not, as noted previously, tie his firing to his back problems and that his never requested to take FMLA leave.

***Kim v. Bogopa Servs. Corp.*, No. 15-CV-2174 (ILG) (LB), 2017 WL 3242253 (E.D.N.Y. July 28, 2017)**

Employee, a produce manager at a grocery store chain, brought suit against employer for interference under the FMLA. Employee began working for employer in 2005. In 2013, he was diagnosed with depression. Between August 7, 2014 and August 12, 2014, employee failed to show up for work on four consecutive days and was late for his next two shifts. Pending an investigation into employee's unexcused absences, employer suspended him for a week.

Following the investigation, employee returned to work and received a final warning informing him that any further infractions would result in termination. Shortly thereafter, employee took a two-week approved vacation during which, he met with a doctor who noted that employee's Schizoaffective Disorder had worsened. Employee called his supervisor that day and told him that he was traveling to Korea to seek treatment. Employee's supervisor informed employee that he needed to file a request for leave, which he failed to do. Upon employee's return from Korea, employer allowed him to return to work after he provided a doctor's note clearing him to return without restrictions. Shortly after returning to work, employee arrived for a shift two hours late and left four hours early. Employer subsequently terminated him for tardiness.

Employee alleged that employer interfered with his FMLA rights by failing to give him notice regarding whether any additional FMLA leave was available. Employee contended that he would have taken additional FMLA leave if he knew it was available. However, he did not provide any evidence that he was unable to perform the functions of his position as required by the FMLA. The United States District Court for the Eastern District of New York granted employer's motion for summary judgment, finding that employee failed to establish that he was entitled to additional FMLA leave. Noting that employee provided employer with a doctor's note unconditionally clearing him to return to work, the court found that employer could not have interfered with employee's FMLA rights as he was not entitled to additional FMLA leave.

***Wilson v. Dynasplint Sys., Inc.*, No. 3:14-CV-310, 2017 WL 1208848 (S.D. Ohio Apr. 3, 2017)**

Employee brought a retaliation claim alleging that he was terminated for requesting FMLA leave when employee's partner went into unexpected labor a month earlier than employee expected. Further, employee asserted employer had sufficient notice prior to his email requesting FMLA leave when his partner went into labor because employee's supervisor was aware employee was expecting a child sometime in the spring. Employer contended that employee provided insufficient notice. Furthermore, employer argued that employee would have

been terminated regardless of employee's request for FMLA leave because employee had been failing to meet employer's expectations. The district court granted employers' motion for summary judgment, holding that under the FMLA, an employee is required to provide at least thirty-day notice of the impending date and duration of the anticipated FMLA leave. In addition, the district court held that employers' mere awareness that employee was expecting a child sometime in spring was insufficient notice since the birth of a child is a foreseeable event. Furthermore, the court held that there was no issue of material fact as to a causal connection between employee's termination and his taking FMLA leave given that employer had made the decision to terminate employee before he requested FMLA leave.

Summarized elsewhere:
***Isley v. Aker Philadelphia Shipyard, Inc.*, No. 16-1462, __ F. Supp. 3d __, 2017 WL 3534982 (E.D. Pa. Aug. 17, 2017)**

***Sine v. Rockhill Mennonite Home*, No. 17-0043, __ F. Supp. 3d __, 2017 WL 3172721 (E.D. Pa. July 26, 2017)**

1. Foreseeable Leave

***Gardner v. Summit Cnty. Educ. Serv. Ctr.*, No. 5:15CV1270, 2017 WL 979120 (N.D. Ohio Mar. 14, 2017)**

Employee, a teacher, brought an FMLA interference and retaliation claim and an equitable estoppel claim against former employer, defendants Summit County Educational Service Center and Summit County Educational Service Center Governing Board, after termination of his employment. Defendants moved for summary judgment on all counts; the Northern District of Ohio, Eastern Division granted the motion.

The court explained that to establish a claim for an FMLA interference, an employee must make a *prima facie* showing that (1) he gave his employer notice of his intent to take leave, (2) his employer denied him FMLA benefits, and (3) his employer interfered with FMLA benefits or rights to which he was entitled. Here, employee failed to give defendants 30-days' notice of his surgery. The record indicated that after defendants became aware of employee's surgery, it offered to employee the option to exercise his FMLA rights. The court held that because employee did not provide defendants proper notice of his intent to take leave, employee cannot demonstrate a genuine issue of material fact on his claim for interference with FMLA.

Next, employee alleged that defendants retaliated against him for taking FMLA leave by not renewing his teaching contract. The court found that defendants presented evidence of a legitimate, non-discriminatory reason for terminating employee's contract, i.e. three consecutive years of poor work performance that pre-dated his surgery. Employee did not challenge facts that illustrated the poor work performances. After his surgery, employee made "insufficient improvements" and continued to perform poorly despite several accommodations made by defendants. The court concluded that defendants were entitled to judgment as a matter of law on the retaliation claim.

Regarding the equitable claim for FMLA estoppel, employee failed to show an essential element: that defendants made a misrepresentation of a material fact which he reasonably relied on to his detriment. Therefore, defendants were entitled to judgment as a matter of law.

a. Need for Leave Foreseeable for 30 or More Days

Summarized elsewhere:
***Cronk v. Dolgencorp, LLC*, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)**

***Gardner v. Summit Cnty. Educ. Serv. Ctr.*, No. 5:15CV1270, 2017 WL 979120 (N.D. Ohio Mar. 14, 2017)**

b. Need for Leave Foreseeable for Less Than 30 Days

2. Unforeseeable Leave

***Boadi v. Ctr. for Human Dev., Inc.*, 239 F. Supp. 3d 333 (D. Mass. 2017)**

Employee worked as a residential counselor for employer, which assisted adult clients with mental impairments. During a nine day period of absence in April 2013, employee was hospitalized with a mental condition that came about unexpectedly and one that made her unable to communicate with anyone. During this absence, her son communicated with various managerial employees of employer with respect to her condition and her ability to return to work. Due to miscommunications within employer's managerial structure, it determined that she had failed to notify employer of her absence for three consecutive days. Because this violated employer's policy, she was terminated and sued employer for violating the interference provisions of FMLA. Employer moved for summary judgment, contending that employee's failure to comply with its policy requiring that she personally notify employer of her absence was not related to any FMLA leave she requested and was therefore a proper basis in dismissing her.

The court disagreed, ruling that where a leave is unforeseeable and unusual circumstances lie, an employer cannot enforce its policy requiring an employee to contact employer unless that policy is consistent with the FMLA. In employee's case, her absence was unforeseeable because she fell ill unexpectedly. However, the court held that an issue for trial existed on the issue of whether there existed unusual circumstances as to whether she could or could not contact anyone by herself. If so, employer's notice policy requiring that employee herself give notice would conflict with the FMLA since its implementing regulations allow for a third person to contact an employer where there are unusual circumstances. In so ruling, the court distinguished a case relied on by employer upholding a discharge of an employee for violating a notice policy there. That was because the issue in that matter did not involve whether an employee should give notice about his or her absence but instead whether employee violated an employer policy requiring employee to give notice to a supervisor.

The court also denied summary judgment on the issue of whether a manager overseeing employee's direct supervisor should be personally liable under the FMLA. Personal liability is determined by weighing several factors, the two most important of which are whether a supervisor exerted some control over employee's position and whether that supervisor contributed to the FMLA violation. While the manager was employee's indirect supervisor, the manager also made decisions as to employee decision and allegedly set into motion the decision to terminate employee. In view of these facts, summary judgment in favor of the manager was not appropriate.

***Stringfield v. Cosentino's Food Stores*, No. 15-0693-CV-W-FJG, 2017 WL 3880774 (W.D. Mo. Sept. 5, 2017)**

In denying employer's motion for summary judgment on a claim for interference with the exercise of FMLA rights, the court found that an employee was not required to give notice prior to taking FMLA leave, and that an employer failed to produce some evidence that employee would have been discharged for a reason unrelated to the request for FMLA leave.

A former deli worker brought suit against the market that employed her, alleging employer discharged her for attendance violations rather than grant her FMLA leave. A district court in Missouri denied employer's motion for summary judgment on the grounds that there were disputed issues of fact regarding whether employee provided employer with adequate and timely notice that she was requesting FMLA leave, and whether employee was terminated for a reason unrelated to her FMLA claim. The court rejected employer's argument that employee should have informed a manager that she was not feeling well *before* she left work. The FMLA requires employees to give employers notice of their intent to take FMLA leave, but it does not require employees to give notice prior to taking unforeseeable FMLA leave. Precedent held that notice was adequate and timely if employee gave its employer at least verbal notification within one or two business days following an unforeseen event. Employee's father called employer the day after she left work and informed employer that employee was sick and under a doctor's care. Two days after she left work, employee's father personally delivered to employer written documentation of employee's medical condition. In the Eight Circuit, whether an employee gives sufficient information to put her employer on notice is a question of fact for the jury.

The court furthered rejected employer's argument that employee was terminated for violating its attendance policies. Employee left work immediately following a disciplinary meeting with her supervisors during which employee was presented with a final written warning for violating employer's attendance policy and was informed that any additional incidents would result in termination. When management learned employee left before the end of her shift, employer terminated employee for abandoning her job. The court held that if a jury determined that employee had given adequate and timely notice, her absence would then have been covered by the FMLA. Accordingly, employer could not carry its burden to show that employee would have been terminated regardless of her absence after the disciplinary meeting.

Summarized elsewhere:
***Hair v. Fayette Cnty. of Pa.*, 265 F. Supp. 3d 544 (W.D. Penn. 2017)**

3. Military Family Leave

B. Manner of Providing Notice

***Reeder v. Cnty. of Wayne, Mich.*, 694 F. App'x 1001 (6th Cir. 2017)**

Employee Reeder worked as a deputy sheriff for fifteen years for employer Wayne County. After about fourteen years and finding his brother's body in the Detroit River and his father suffering from cancer, employee told employer that he could not work overtime anymore because so the stress, anxiety, and depression from those events. He continued to work eight-hour shifts but refused all overtime. He was disciplined and suspended. He delivered to employer's personnel office a letter from his treating physician, alerting employer that employee could not work more than eight hours because of chest pain and anxiety. Employer did not

advise employee of his rights under FMLA. Eventually employer fired employee for his refusal to work overtime. Employee sued employer for interference and retaliation under FMLA. The case was tried to a jury, which returned a verdict of $187,500 on the interference claim. Employer appealed. The court of appeals affirmed the lower court.

On appeal, employer argued that employee never asked for FMLA leave and never provided enough information to put employer on notice that he suffered from a serious medical condition warranting relief under the FMLA. Employer urged that because of this failure, employer should have been granted judgment as a matter of law. The court of appeals ruled that the "notice of intention" is intensely factual. An employee need not expressly assert rights under the FMLA, but will be deemed to have given employer sufficient notice by providing information from which employer can reasonably conclude that an FMLA-qualifying circumstance is in play. If employee provides incomplete certification, employer shall so advise employee and "shall state in writing what additional information is necessary." The appellate court ruled that employee's delivery of three medical notices that he was unable to work overtime created a jury question of whether employee met his notice of intention burden. Finally, the court ruled that even though employee had asked for FMLA several years earlier, that fact alone does not establish that employee failed to avail himself of the FMLA relief process required by employer. At most, according to the court, that creates another issue of fact for the jury to weigh.

***Gravel v. Costco Wholesale Corp.*, 230 F. Supp. 3d 430 (E.D. Pa. 2017)**

Employee alleged that his former employer violated the FMLA's anti-retaliation and anti-interference provisions. Employer moved for summary judgment arguing that that employee failed to invoke his FMLA rights when he explicated stated his desire not to take FMLA leave. The court granted summary judgment finding that no rational trier of fact could conclude that employee's notice was adequate. In reaching this determination the court highlighted the fact that employee was a payroll clerk who was intimately familiar with the organization's FMLA policies and the procedures for obtaining leave under the FMLA.

***Fralick v. Biaggi's Inc.*, No. 16-CV-1015, 2017 WL 6543862 (C.D. Ill. Dec. 21, 2017)**

Employee was a server for employer. He was hired around June 27, 2012. In March 2013, he missed a few days of work due to an arm injury, which he suffered during a DUI incident. At this time, he was not eligible for FMLA leave. Throughout his employment, employee had a reputation for spreading rumors. On Monday, March 9, 2015, employee called the restaurant and left a message with the chef partner to tell the manager he wanted the day off. Later that day, employee was admitted to the hospital for attempting suicide by taking prescription medication. Employee was diagnosed with depression. Employee was released from all of his shifts from March 11 through March 15. On March 13, he was released from the hospital. Employee testified that he did not believe he was absent from work while hospitalized because his shifts were released. Employee immediately tried to get back on the schedule, but was told he had to meet with the restaurant's managing partner first. Employee arranged to meet with the managing partner on March 14, but never showed up or contacted him. (In his response to employer's motion for summary judgment, employee claimed no meeting was ever scheduled for March 14.) Employee contacted the managing partner on March 16, and they arranged to meet on March 17. During this meeting, they did not discuss the FMLA "because [employee] released his shifts," and the managing partner "didn't need to [request a doctor's note]" because

employee "was ready to return to work." Employee never raised the question of FMLA at any time with anyone at the restaurant before or after his termination. During the meeting, employee was asked if he had spread a certain rumor, and employee denied doing so. The managing partner expressed concern about employee lying about not showing up on March 14 and spreading rumors, and terminated him.

Employee filed a complaint, alleging employer willfully refused to grant him all benefits to which he was entitled under the FMLA. He claimed his termination violated the FMLA because his hospital stay was covered by the FMLA, and he was terminated for that absence. Employer moved for summary judgment.

In addressing employee's interference claim, the court said employee was entitled to FMLA leave. His depression, which led to a suicide attempt and hospitalization, qualified as a serious health condition. The court said employee had given sufficient notice of his intent to take FMLA leave. Although employer stated it did not know employee attempted suicide until the current litigation, employee's former roommate testified she told employer on March 9, 2015 that employee had attempted suicide and been admitted to the hospital. Employer released employee from all his shifts that week, suggesting it knew something serious had happened. The court said there was a genuine issue of material fact as to whether employer denied [or interfered with] benefits to which employee was entitled. Employer contended it terminated employee for his history of bad decision-making: his spreading gossip and then denying it, and his failure to show up for the March 14, 2015 meeting and then denying it. But employee testified that the managing partner told employee he was being terminated due to his absences (his absence after the DUI, and his absence following his hospitalization). The court said this allegation defeated employer's motion for summary judgment on both employee's FMLA interference and retaliation claims.

***McCallum v. Grays Harbor Cnty.*, No. 3:16-cv-05609-RJB, 2017 WL 3387347 (W.D. Wash. Aug. 7, 2017)**

Employee, a clerk for a county board of commissioners, brought suit against employer for interference under the FMLA. On December 14, 2014, employee underwent retinal vascular surgery. At the time, she told employer she expected to return roughly four to six weeks later. On December 26, 2014, employee, through her husband, provided employer with a doctor's note stating she could return to work on January 12, 2015. On January 14, 2015, employee still had not returned to work, and the Board of Commissioners voted to consider terminate her for job abandonment. On January 20, 2015, at a pre-termination due process hearing, employee provided employer with a doctor's note stating she could return to work on January 22, 2015. Employee also reminded employer that she initially stated she would be out for four to six weeks and she was available by phone. On January 21, 2015, the Board of Commissioners held a special session where it decided to terminate employee in part for job abandonment. Throughout her time off, employee used sick leave rather than FMLA leave.

Employee alleged that employer interfered with her FMLA rights "by failing to notify [p]laintiff of her rights and to grant her leave, despite her eligibility." To state a *prima facie* case of unlawful interference, an employee needs to show that: (1) she was eligible for FMLA leave, (2) employer was covered by the FMLA, (3) employee was entitled to take FMLA leave, (4) she gave sufficient notice of her intent to take FMLA leave, and (5) employer denied her FMLA leave. In ruling on employer's motion for summary judgment, the court focused solely on

whether employee provided sufficient notice of her intent to take FMLA leave as employer conceded she was qualified to take leave.

Employer contended that by using sick leave, employee affirmatively declined to use FMLA leave. Employee argued that she did not need to expressly invoke FMLA leave. Rather, she only needed to establish that she told employer the nature of her illness and the likely duration of her absence. The court noted that employee's interpretation of the FMLA's requirements was correct and, on the assumed date of employee's termination (January 21, 2015), employer had two doctor's notes detailing employee's medical condition, physical limitations, and the expected timing and duration of her absence. Likewise, on January 20, 2015, employee reminded employer that she gave notice she would be out four to six weeks. Therefore, the court found that the two notes along with employee's statements to employer were sufficient to create a triable issue of fact as to whether employee gave employer sufficient notice of intent to take FMLA leave.

The court further noted that affirmatively declining to use FMLA leave to preserve it for later use is different than "permanently relinquishing that right." As such, the court also found, at the very least, an issue of fact existed as to whether employee used sick leave with the intention of permanently relinquishing her right to invoke FMLA leave. Therefore, the United States District Court for the Western District of Washington denied the employer's motion for summary judgment.

***McKinley v. Rapid Global Bus. Solutions, Inc.*, No. 1:17-cv-00621-LJM-MJD, 2017 WL 3173058 (S.D. Ind. July 26, 2017)**

Employee brought suit against her former employer for retaliation and interference under the FMLA. After being hired as a Production Control Supervisor, employee signed an employment agreement that purported to reduce her statute of limitations to bring an FMLA claim (or any claim arising out her employment) to six months. In March 2015, a fire at the plant where employee worked worsened one of her chronic health conditions. Employee promptly relayed this information to her supervisor. In late-May 2015, employee told employer that her breathing problems had flared up, requiring her to miss work. On June 1, 2015 employee informed employer that she would need to take off until June 10, 2015, to treat a serious health condition. On June 5, 2015, employer informed her that it was terminating her employment because she was going to miss too much work.

In its motion to dismiss, employer argued that employee's claims were time-barred under her employment agreement, and that she failed to state a claim for both retaliation and interference.

Employer first argued that employee's claim was time-barred because she consented to be bound by the six month statute of limitations in her employment agreement, and her claim was filed after that limitations period had run. The United States District Court for the Southern District of Indiana rejected this argument and agreed with the majority of courts that had found employment agreements May not limit the statute of limitations for FMLA claims. Reasoning that the FMLA specifically prevents employers "from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the [FMLA]," the court found the six-month limitations period unenforceable.

Employer further argued that employee did not plead sufficient facts to state a claim for retaliation or interference. Employer contended that employee did not plead facts sufficient to suggest she needed inpatient care or continuing treatment by a health care provider and further that she did not give sufficient notice that she was exercising her FMLA rights. The court noted that employer confused the standard for summary judgment with the standard for a motion to dismiss. The court found that employee, by alleging that she had a chronic health condition that worsened after the fire and that she took time off to treat her condition, had presented a plausible argument that she had notified employer that she needed time off to treat a serious health condition. Because employer had terminated her rather than giving her time off or requesting additional information about why she needed the time off, the court denied employer's motion to dismiss, finding employer could be liable for both retaliation and interference.

***Jansson v. Stamford Health, Inc.*, No. 3:16-CV-260 (CSH), 2017 WL 1289824 (D. Conn. Apr. 5, 2017)**

An anesthesiologist brought a claim against employers alleging she was retaliated against for exercising her right under the FMLA to take medical leave of one day due to her daughter's medical condition. Employee filed a proposed amended complaint alleging that employers retaliated against her for exercising her right under the FMLA.

The court found that employee failed to plead a plausible claim for retaliation in violation of the FMLA. First, employee failed to allege that employer hospital was her "employer" under the FMLA. Second, employee failed to allege facts that show that she fulfilled the notice requirement under the FMLA. Employee alleges that she called in sick for one day by calling a fellow doctor, informing him that she was not well enough to come in to work, with no indication that she mentioned a need for FMLA leave, specified a leave period, or gave sufficient factual information about her daughter's illness. Simply calling in sick does not constitute sufficient notice for FMLA leave. Third, regarding notice, employee's allegations do not suggest that she conveyed her request for a sick day to a supervisory or administrative official at employers' hospital, and, in light of employee's position as a Director, it is likely that the doctor she called was her subordinate. Fourth, even if employee had properly pled FMLA retaliation, she failed to allege facts to suggest that her condition or her daughter's illness fulfill the requirements for a serious health condition under the FMLA. Employee simply alleged that she called in sick because she wanted to be with her daughter when her daughter was ill, in addition to her own emotional and physical exhaustion, which did not suggest a serious health condition to warrant FMLA leave. Thus, the court concluded that employee's allegations failed to show that she exercised her rights protected under the FMLA and denied employee's second motion to amend her complaint with respect to her FMLA claim.

Summarized elsewhere:
***McQuillen v. PetSmart, Inc.*, 694 F. App'x 420 (7th Cir. 2017)**

***Boadi v. Ctr. for Human Dev., Inc.*, 239 F. Supp. 3d 333 (D. Mass. 2017)**

***Morrow v. AI-Cares, LLC*, No. 2:17-cv-10057, 2017 WL 3215206 (E.D. Mich. July 28, 2017)**

***Dallefeld v. The Clubs at River City, Inc.*, No. 1:15-cv-01244-JES-JEH, 2017 WL 3013241 (C.D. Ill. July 14, 2017)**

***Cronk v. Dolgencorp, LLC*, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)**

C. Content of Notice

***Coutard v. Mun. Credit Union*, 848 F.3d 102 (2d Cir. 2017)**

Employee filed suit against his employer, a financial institution, alleging it violated and interfered with his rights under the FMLA after he sought leave to take care of his seriously ill grandfather who, *in loco parentis*, had raised him as a child. Employer denied him leave on the basis that the FMLA does not apply to grandparents, and it terminated his employment when he remained at home to care for his grandfather. When employee had requested leave, he did not provide information suggesting that his grandfather stood *in loco parentis* to him when he was a child. Employer had not and did not inform employee that the FMLA covered *in loco parentis* relationships. In granting summary judgment to employer, the district court had found that that employee had not sufficiently informed employer of the *in loco parentis* relationship and that it was on that basis he sought FMLA leave. The district court found that an employee's notice obligation under the FMLA is to provide employer with all of the needed information at or before the time he requests leave.

The Second Circuit disagreed and vacated the district court's decision granting summary judgment to employer. The court held that because employee met the eligibility requirements for FMLA leave and requested that leave expressly to care for his seriously ill grandfather, employer had an obligation to specify the additional information that it needed in order to determine whether he was entitled to such leave. The court found that the "Responsibilities" section of the DOL Form provided in Appendix C to 29 C.F.R. Part 825 and the related regulations "establish that if an eligible employee provides sufficient information for the employer reasonably to determine that the requested leave 'may' qualify for FMLA protection, the employer 'must' specify whether, and what, additional information is required for a determination of whether the employees is entitled to such leave." The court found that whether or not a covered employer uses the DOL Form, it must inform employees of those respective responsibilities. Thus, the court concluded that an employee has provided sufficient notice to his employer if such notice indicates reasonably that FMLA m*ay* apply. The court found employee here satisfied that responsibility, and that employer did not satisfy its obligations. Accordingly, the court ruled that the district court erred in deciding that employer was entitled as a matter of law to deny employee leave without requesting additional information.

Employer contended that the court should affirm summary judgment on alternative grounds, including that employee's alleged failure to provide a certification that his grandfather had a serious health condition and that employee failed to mitigate damages when he did not accept employer's conditional offer of reinstatement. The court found these contentions meritless. First, there was no indication that employer ever requested medical certification pursuant to the FMLA. Second, employer's offer of reinstatement could not be a basis for affirmance of summary judgment, as it was inadmissible evidence. Finally, the court rejected employee's contention that because employer failed in its obligations, he was entitled to partial summary judgment in his favor on the issue of liability. The court found there was still a genuine issue of material fact as to whether employee's grandfather actually raised employee *in loco parentis*.

***Carlson v. Sexton Ford Sales, Inc.*, No. 4:15-cv-04227-SLD-JEH, 2017 WL 4273618 (C.D. Ill. Sept. 26, 2017)**

Employee car salesman was a veteran with a diagnosis of, *inter alia*, Post-Traumatic Stress Disorder (PTSD). This condition required employee to miss work for appointments at the Veterans Administration hospital, as well as intermittently negatively impacting employee's ability to work due to anxiety and panic attacks. Employer sometimes denied employee's requests to leave work early due to symptoms, or to take time off for appointments unless employee could find another salesperson to cover for him. Finally, employer discharged employee for poor sales performance one week after employee received a disability rating of 70% from the VA due to the severity of his PTSD. Employee filed suit alleging interference and retaliation claims under the FMLA and the ADA.

The court denied employer's motion for summary judgment as to all claims except a procedural FMLA claim. The court found that employee had presented more than enough evidence to proceed to trial on his FMLA interference and retaliation claims. Employee's repeated VA appointments, his requests to go home because of symptoms or side effects of his medication, and employee's testimony that he had told two of his managers about his PTSD, one of whom was a veteran with PTSD himself, created a genuine issue of material fact on whether employer had sufficient notice that employee needed FMLA leave. The court also found employee's evidence of causation to be strong where his discharge occurred shortly after several VA appointments and receipt of his VA disability rating, and employee presented evidence that employer's claim of employee's poor performance was weak.

Summarized elsewhere:
***Walpool v. Frymaster LLC*, No. CV 17-0558, 2017 WL 5505396 (W.D. La. Nov. 16, 2017)**

***Goss v. Umicore USA*, No. 15-555-JJM-PAS, 2017 WL 3981295 (D.R.I. Sept. 8, 2017)**

***Spears v. Water & Sewage Auth. of Cabarrus Cnty.*, No. 1:15cv859, 2017 WL 2275011 (M.D. N.C. May 24, 2017)**

***Craig v. Charles Town Gen. Hosp.*, No. 3:16-CV-36 (GROH), 2017 WL 2260697 (N.D. W.Va. May 23, 2017)**

***Davidson v. Evergreen Park Cmty. High Sch. Dist. 231*, No. 15 C 0039, 2017 WL 2243096 (N.D. Ill. May 23, 2017)**

***Jansson v. Stamford Health, Inc.*, No. 3:16-CV-260 (CSH), 2017 WL 1289824 (D. Conn. Apr. 5, 2017)**

***Crain v. Schlumberger Tech. Co.*, No. CV 15-1777, 2017 WL 713673 (E.D. La. Feb. 23, 2017)**

D. Change of Circumstances

E. Consequences of Employee Failure to Comply with Notice of Need for Leave Requirements

***IBEW Local 1600 v. PPL Elec. Util. Corp.*, No. 5:16-CV-04675, 2017 WL 6547138 (E.D. Pa. Dec. 22, 2017)**

Employee worked for PPL Electric Utilities. Employer required all employees taking sick leave to call their supervisor on the day leave was needed. But if an employee wished to use FMLA leave, she was required to make a three- to five-minute phone call to a third party administrator ("Sedgwick") in addition to calling her supervisor. Employee failed to call Sedgwick on several days in July 2015 when she wanted to take FMLA leave, due to "incoherence." As a result, her requests for FMLA leave were denied. Employee's union, the International Brotherhood of Electrical Workers Local 1600 ("IBEW"), filed a grievance against employer in behalf of employee. After the arbitrator dismissed the grievance, IBEW filed a suit against employer to aside the arbitration award. Employee sued employer for FMLA interference. Employer filed a motion for summary judgment on both actions.

IBEW argued that because the award upheld a PPL policy that violated FMLA regulations, it was manifestly contrary to federal law. Furthermore, arbitrator's finding that the policy contained an exception for unusual circumstances was not supported by the record. The court ruled that employer's call-in policy did not violate FMLA regulations. Employers May impose requirements governing their employees' notice of FMLA leave that extend beyond the FMLA's own notice requirements, provided they do not contradict the FMLA's notice requirements. Employer's rule that an employee call two parties was not so burdensome that it would discourage an employee from taking unforeseeable FMLA leave. Regarding IBEW's contention that employer's policy did not contain an exception for unusual circumstances, the court said this was not true. Employer's policy stated, "[e]mployees must comply with the usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances when the need for leave is not foreseeable." Employee failed to demonstrate that unusual circumstances prevented her from complying with employer's notice requirement. Employee had contacted Sedgwick about 100 times in her career, due to her anxiety attacks. She provided no details as to how her condition on July 13, 2015 was worse than on previous occasions. Her testimony cast doubt on her assertion that her condition on July 13 truly prevented her from calling Sedgwick. While she was incoherent, she was able to drive herself home, a 30-minute trip on the highway. Employer's summary judgment motion was granted.

***Garrison v. Dolgencorp, LLC*, No. 4:16-CV-00349-DGK, 2017 WL 6045481 (W.D. Mo. Dec. 6, 2017)**

Employee commenced work for her retail store employer in 2013 as a sales associate. At the time of her hire, she was issued an employee handbook that instructed employees seeking to take a leave of absence to contact Matrix Absence Management ("Matrix"). During her employ, employee suffered from various health problems, such as anxiety, depression, headaches, sinus congestion, and a lump in the breast. She told defendant Sandra Bell, her supervisor, about the anxiety, depression, and headaches, and asked Bell how she should go about taking a leave of absence. Bell told employee she did not believe employee qualified for any of the leave options, but urged her to contact human resources and consult the employee handbook. Employee did not recall taking any of this advice. In May 2017, employee went to the emergency room for gastritis and anxiety, and was released shortly thereafter. Later that month, employee sent Bell a

message saying she could not "do this anymore." She resigned the next day. She filed an action against employer, claiming she was forced to resign because she was not offered leave under the FMLA. Employer filed a motion for summary judgment.

The court said that the undisputed material facts did not establish that employee suffered from a serious health condition. She was not receiving ongoing treatment for her anxiety. Her depression and headaches did not result in any period of incapacity. The court stated that a serious health condition is a prerequisite for FMLA leave. Moreover, employee did not provide employer with adequate notice of her need for leave. Bell's awareness of employee's anxiety, depression, and headaches was not sufficient to constitute notice. Prior to her emergency room visit, there was nothing in the record showing that employee's medical conditions were causing her to miss work. Employee's queries to Bell as to how she should go about taking leave lacked information necessary to qualify as notice under the FMLA. Most important, employee failed to contact Matrix as instructed by the employee handbook. The court quoted 29 C.F.R. § 825.302(d): "Where an employee does not comply with the employer's usual notice and procedural requirement, and no unusual circumstances justify the failure to comply, FMLA-protected leave May be delayed or denied." The court granted employer's motion.

***Sylvester v. DGMB Casino, LLC*, No. 15-8328 (RMB/KMW), 2017 WL 3894964 (D.N.J. Sept. 6, 2017)**

In granting employer's motion for summary judgment, the court found that simply visiting the HR offices and inquiring about the FMLA is insufficient to constitute notice of employee's exercise of FMLA rights where employee does not provide notice of the reason for such leave. The court noted that employee could provide no probative evidence of when she visited the office, whom she met with, or what was said during such visit.

Employee was a dual rate dealer employed by a casino. Dual rate dealers work some shifts as dealers and others as supervisors. Employee brought suit against the casino for interference and retaliation in violation of FMLA when it terminated her following a mandatory team-building exercise. The proffered reason for employee's termination was "uncooperative and unprofessional conduct."

The district court granted the casino's motion for summary judgment as to retaliation because employee failed to defend the claim in her opposition brief, and as to interference because employee failed to establish that she exercised any rights under the FMLA. In most cases, an employee is required to provide at least verbal notice making employer aware that she needs FMLA-qualifying leave, when, and for how long. An employee is not required to expressly assert rights under the FMLA or otherwise invoke any particular "magic words." Here, employee requested FMLA paperwork from employer's human resources office, but did not indicate why she wanted the paperwork and could not identify the person with whom she spoke. Further, employee did not submit the completed FMLA paperwork to employer, she did not tell employer or any co-workers about her intent to take FMLA leave, and she did not inform employer that she suffered from any pain or disability that would require her to take leave. Finally, employee never requested an accommodation for her back pain or disability.

***Stein v. Atlas Indus., Inc.*, No. 3:15CV00112, 2017 WL 2720339 (N.D. Ohio June 23, 2017)**

A long-term employee who was terminated after he did not report or call into work after he was released to return to work (according to the documentation employer received) asserted FMLA interference and retaliation claims. Granting employer's motion for summary judgment on the inference claim, the court noted that the regulations permit an employer to impose and enforce notice requirements. Because employee did not show unusual circumstances justifying his failure to follow employer's notice requirements, his interference claim failed. Additionally, the court noted that pursuant to employer's policy, employer was not responsible for contacting employee to determine the need for additional leave. Instead, it was employee's responsibility to keep employer apprised when he is unable to work, the reason for not being able to work and to inform his supervisor in accordance with the time requirements of the policy. Here, employee's lack of communication regarding his intent to extend his leave justified employer's decision to rely on the information it had regarding employee's return to work date. Next, dismissing the retaliation claim, the court concluded that there was no evidence that employer did not enforce its attendance or FMLA-related policies as to other employees who breached the policies.

***Yolich v. Fin. Mgmt. Sys. Inc.*, No. 16 C 4007, 2017 WL 1199744 (N.D. Ill. Mar. 30, 2017)**

Employee began working for employer in or around May 2014. In July 2015, shortly after completing one (1) year of service with employer, employee informed his supervisor that he would be absent from work for a medical procedure. In response, employee's supervisor instructed him to contact the Human Resources Department ("HR") and apply for FMLA leave if employee anticipated being absent from work for more than a couple of days. Employer contends that on or around July 15, 2015, HR met in-person with employee to discuss employee's FMLA rights and to go over the necessary FMLA paperwork. Employee denies meeting with HR, alleging that despite being told by his supervisor to go to HR and apply for FMLA leave, he did not do so. Employee disappeared from work without submitting any FMLA paperwork. After employee failed to report to work for more than a few days, employer made several attempts to contact employee by both phone and written correspondence to inquire about his work status and FMLA paperwork, all of which went unanswered. In or around September 2015, employer sent employee a discharge letter, indicating that employee's employment was being terminated because he had missed too many days of work/failed to return to work. Following his discharge, employee filed suit against employer, alleging FMLA interference and retaliation.

Employer filed a motion for summary judgment, which the court granted. As to employee's interference claim, the court reasoned that employee failed to take advantage of the ample opportunities to notify employer of his need for FMLA leave and to submit the necessary FMLA paperwork. In reaching this conclusion, the court noted that in his prior jobs, employee supervised over 200 employees and should have been familiar with dealing with employee absences. Likewise, the court found that employee failed to submit any evidence of FMLA retaliation, noting that it was undisputed that no one at FMS ever made any derogatory statements about employee's medical situation or his need to take medical leave. Rather, the undisputed facts show that despite employee's failure to notify employer of his need for FMLA leave, FMS made extensive efforts to contact employee to learn why he had not returned to work. The court concluded that employee's employment was lawfully terminated because he was absent from work without proper notification and failed to respond to FMS concerning his absences.

***Randolph v. Detroit Pub. Sch.*, No. 15-13975, 2017 WL 1077673 (E.D. Mich. Mar. 22, 2017)**

Employee, a full-time substitute teacher, filed an FMLA claim for failure to provide him with up to 12-weeks unpaid leave to care for his mother. Both parties filed for summary judgment and court granted employer's motion, dismissing employee's cause of action. Employee represented his mother had been diagnosed with cancer. After receiving a diagnosis, employee contacted a human resources technician, who informed him that, because he was not a contract teacher, he was not eligible for FMLA leave. Employee resigned and, when asked for his job back, was placed on a "do not hire" list.

Employer's summary judgment was granted based on employee's failure to offer sufficient evidence that his mother suffered from a serious medical condition. The court noted the record was devoid of any medical documents regarding employee's mother's health condition. During discovery employee had been put on notice twice by employer that there was a lack of any such evidence. First in Rule 26 disclosure, employee claimed he possessed such documents but failed to provide any for the record. Later, when employee filed for summary judgment, he failed to produce any medical records after employer's response noting employee's failure to provide such documents.

Additionally, employee failed to produce any records in response to employer's motion for summary judgment. The court held "employee's testimony, whether by deposition of affidavit…is inadmissible hearsay and cannot establish a genuine dispute of material fact," ruling that employee failed to meet his burden of proving his mother's illness to establish a *prima facie* case.

***McQuillen v. Petsmart, Inc.*, No. 15 C 9953, 2017 WL 661586 (N.D. Ill. Feb. 16, 2017)**

A former PetSmart, Inc. employee sued for interference under the FMLA. He had not disclosed significant health issues to his employer, and performed his duties without problems until April 13, 2014. On April 14 and 15th, he failed to report to work. When contacted by his supervisor, employee's wife indicated that he had passed out drunk. Eventually, his wife took him to the hospital. On April 18th, employee called his supervisor, who told employee that he had been terminated. Employee then contacted the HR Department, and was advised that HR was working with its legal team.

Employer moved for summary judgment. The court determined that employee could not establish, on the basis of the undisputed facts, that he was entitled to FMLA leave, as he had not provided sufficient notice of his need for leave. Employee had not established that employer even knew that employee had a medical condition when it terminated him. The court granted summary judgment to employer.

***Cummins v. Curo Health Servs. LLC*, No. 1:15-CV-102-SA-DAS, 2017 WL 473896 (N.D. Miss. Feb. 3, 2017)**

Employee, a registered nurse hired as a case manager, filed suit against her former employer, a hospice care provider, alleging that it violated her rights protected under the FMLA. Employee injured her shoulder while treating a patient and was subsequently placed on light duty. Around five months later, she was laid off. Employee alleged that her former employer failed to provide her with notice and opportunity for leave as required by the FMLA. Employer moved for summary judgment, arguing that employee never requested leave and that, even if she

had, it was not available to her. A Mississippi district court granted employer's motion. The court noted it was undisputed that employer complied generally with the notice requirements of the FMLA, that employee was on notice that as an employee she was eligible for FMLA leave, and that employee never requested leave. The court therefore concluded employee had not alleged the necessary facts or brought forth sufficient evidence to substantiate her claim, and it granted summary judgment.

Scales v. FedEx Ground Package Sys. Inc., No. 15 C 50038, 2017 WL 345576 (N.D. Ill. Jan. 24, 2017)

Employee worked as a manager, which required him to inform his subordinates how to contact employer's FMLA administrator if they thought they needed FMLA leave. Employee also had a long history of progressive discipline for unpleasant and inappropriate comments and behavior in the workplace which resulted in his placement on a Performance Improvement Plan (PIP). This plan was extended, but ultimately employee's behavior improved. Shortly after the completion of his PIP employee informed his employer that he would need FMLA leave for hip replacement surgery. His employer e-mailed employee a form and instructed him to complete it and submit it to the FMLA administrator, but employee did not do so. Employer then received another complaint about employee, conducted an investigation which confirmed inappropriate conduct similar to that which was the subject of the PIP and terminated employee. The termination was effective the day after employee's surgery. Employee sued alleging both FMLA interference and FMLA retaliation.

The district court granted summary judgment for employer. It determined that there was a complete lack of evidence that employer interfered with employee's attempt to take FMLA leave, as it sent him an e-mail with the appropriate form and instructions for applying for FMLA leave, and employee had significant experience referring his subordinates to contact the FMLA administrator when they raised the issue of the FMLA. On the retaliation claim, the court determined that employee had not made a *prima facie* case because the evidence of employee's misconduct was so strong that no causal connection could be shown.

Quintiliani v. Concenctric Healthcare Sols., LLC, No. 1 CA-CV 15-0816, 2017 WL 4288032 (Ariz. App. 1st Div. Sept. 28, 2017)

Employer's handbook contained no summary of the FMLA, only a normal call-off procedure which required employees to speak with their manager if they were unable to work. Employee notified her supervisor of an emergency appendectomy, and a follow-up surgery the next week. Employer permitted her to work as she was able and to use PTO when she could not. Employer never formally notified employee that she had been granted FMLA leave. Employee developed complications and left work without informing her supervisor until she sent an e-mail eight days later informing the supervisor that she would be out for almost another month. Her supervisor informed her that she was out of PTO and requested documentation from her doctor to explain her past and upcoming absences. Four days later employee was discharged for failing to communicate with her supervisor regarding her absences. Employee filed suit alleging, *inter alia*, an FMLA interference claim.

Following a jury verdict for employer on her FMLA claim, employee appealed asserting that her employer's failure to provide her any notice of her FMLA rights made it strictly liable for her FMLA claim. The appellate court disagreed. It found employee's deposition testimony

that she would not have consulted her employee handbook to learn about the FMLA meant that she could show no prejudice due to employer's failure to include an FMLA policy in it. The court also determined that it was reasonable for the jury to conclude that employer did not receive enough information from employee to trigger its obligation to determine whether she was experiencing an FMLA-qualifying health condition. Employee's intermittent work between her surgeries, and her return to work full-time before her unexplained departure was insufficient for employer to be obligated to investigate even when it knew employee's initial absence was due to an emergency appendectomy. Finally, the appellate court found no reversible error in the FMLA interference instruction which had removed three examples of FMLA interference from a model instruction because they were not supported by evidence in the case.

Summarized elsewhere:
***Branham v. Delta Airlines*, 678 F. App'x 702 (10th Cir. 2017)**

***Alexander v. Kellogg*, 674 F. App'x 496 (6th Cir. 2017)**

***Buck v. Mercury Marine*, No. 16-CV-1013-PP, 2017 WL 6557556 (E.D. Wis. Dec. 22, 2017)**

***Taulbee v. Univ. Physician Grp.*, No. 16-10807, 2017 WL 3169241 (E.D. Mich. July 26, 2017)**

***Davidson v. Evergreen Park Cmty. High Sch. Dist. 231*, No. 15 C 0039, 2017 WL 2243096 (N.D. Ill. May 23, 2017)**

***Cronk v. Dolgencorp, LLC*, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)**

***Dulany v. Brennan*, No. 16-CV-149-JHP-FHM, 2017 WL 991070 (N.D. Okla. Mar. 14, 2017)**

***Meles v. Avalon Health Care, LLC*, No. 3:16-545, 2017 WL 551921 (M.D. Tenn. Feb. 10, 2017)**

IV. Employer Response to Employee Notice

Summarized elsewhere:
***Carlson v. Sexton Ford Sales, Inc.*, No. 4:15-cv-04227-SLD-JEH, 2017 WL 4273618 (C.D. Ill. Sept. 26, 2017)**

***Cannon v. Equilon Enters., LLC*, No. 2:14-cv-4805-PMD-KFM, 2017 WL 3484275 (D.S.C. Aug. 15, 2017)**

A. Notice of Eligibility for FMLA Leave

***Van Allen v. Print Art Inc.*, No. CV 15-5983 (RMB/AMD), 2017 WL 1356317 (D.N.J. Apr. 11, 2017)**

On January 19, 2015, employee, a warehouse worker for a print shop employer, began to suffer from a serious rash. He texted his supervisor once that day to inform the supervisor that he would be taking the day off on the MLK holiday, and he texted the supervisor again the following day to inform him that he had a family emergency the previous night and that he was taking the day off. Neither text message mentioned employee's rash. Later on January 20, 2015, employee sent another text message to his employer stating that he tried to get an emergency

appointment with his doctor because he broke out in rashes; he followed up one-and-a-half hours later to let the supervisor know that he would be out the following day to attend a doctor's appointment. Employer terminated him the following day for excessive absenteeism.

Employee brought FMLA interference claims against employer, alleging that employer failed to provide him the FMLA-mandated notification of his right to take leave after he informed employer that he was suffering from a serious medical condition and that employer subsequently fired him due to his FMLA-qualifying absences, which employer refused to designate as such. Employer filed a motion for summary judgment, arguing that employee's medical condition did not constitute a serious health condition under the FMLA because employee failed to provide adequate notice to employer that he suffered from a condition that potentially fell within the FMLA. The court denied summary judgment, finding that the evidence – particularly, the text message informing employer of the rash and the need for an emergency medical appointment – was sufficient to establish a genuine dispute as to whether employee gave adequate notice. Employer further argued that there was no indication that employee was incapacitated for three or more days as a result of his condition, but the court found that this too was a genuine dispute of fact that could not be resolved at the summary judgment stage.

Summarized elsewhere:
***Coutard v. Mun. Credit Union*, 848 F.3d 102 (2d Cir. 2017)**

***Hodnett v. Chardam Gear Co.*, No. 16-10619, 2017 WL 6621527 (E.D. Mich. Dec. 28, 2017)**

B. Notice of Rights and Responsibilities

***Boyed v. Dana Inc.*, No. 3:16CV2609, 2017 WL 1179058 (N.D. Ohio Mar. 30, 2017)**

A temporary employee suffering from mental illness brought suit against employers, a staffing agency and a manufacturing company, alleging that they failed to notify him of his rights under the FMLA and interfered with his exercise of those rights. Due to his mental illness, from time to time, employee needed to obtain medical treatment, but he never made a formal FMLA request. Employee allegedly advised the manufacturing company of his condition and, sometime later, requested permission to alter his work schedule to attend a medical appointment. The manufacturing company denied his request and told him that he would lose his job if he went to the appointment anyway. On the day of the appointment, when employee showed up for work, he was escorted into the management office and told that he was being terminated for his attitude and low productivity. Employee argues that he was never notified of his FMLA rights, which resulted in the interference of his exercise of those rights. The manufacturing company filed a motion to dismiss arguing that it had no obligation under the FMLA to advise employee of his FMLA rights or to grant him FMLA leave because it was not his primary employer. It further argued that employee's primary employer was the staffing agency and that the obligation rested solely with his primary employer. Upon consideration of the FMLA regulations and governing case law, the district court concluded that the staffing agency is the primary employer and that, generally, the duty to give notice of FMLA rights falls on temporary employment agencies.

In response to the motion, employee also argued that the manufacturing company assumed responsibility for providing notice as part of an agreement signed by it and the staffing agency in which the manufacturing company agreed to comply with all applicable laws and

regulations. The district court, however, found that any agreement to comply with the FMLA would be applicable only if there existed a legal obligation imposed on the manufacturing company. The court determined that no such commitment exists under the FMLA unless the manufacturing company is the primary employer. The motion to dismiss the manufacturing company was, therefore, granted.

C. Designation of Leave as FMLA Leave

***Browett v. City of Reno*, 237 F. Supp. 3d 1040 (D. Nev. 2017)**

Employee, a sergeant with almost 10 years of service for the police department, sued his employer the City of Reno for interference and retaliation under the FMLA. His interference claim was based on a substitution-of-leave denial and on employer's forcing him to use FMLA leave. Employee's retaliation claim was based on the city passing him up for promotion because of his prior opposition to the city's FMLA policy. The city, however, argued that it was his method of opposition (not that he opposed the policy) that was the cause. His behavior was described as "argumentative" and "disrespectful." The dispute arose when employee exchanged emails with human resources personnel to clarify his leave request. He wanted to use paid non-FMLA sick leave to care for his wife. Under the FMLA, either employer or employee May substitute paid vacation, personal leave, or medical or sick leave for any part of FMLA leave. But the city misunderstood. It thought employee wanted leave to bond with his newborn, in which case he could not substitute sick leave. He must use vacation time because the FMLA gives the option to substitute paid vacation, personal leave, or family leave to bond with a newborn. The city eventually accepted employee's clarification, but not before forcing him to use some vacation concurrently with FMLA leave.

Initially, the court explained that § 2615(a) encompasses two types of claims. First, § 2615(a)(1) prevents an employer from interfering with an employee exercising or attempting to exercise FMLA rights. The Ninth Circuit declines to apply the *McDonnell Douglas* burden-shifting framework to interference claims under the FMLA. To bring such a claim, an employee can use either direct or circumstantial evidence, or both. Second, § 2615(a)(2) prevents an employer from retaliating against an employee who opposes an unlawful practice under the FMLA. Such a practice must be objectively unlawful, if not actually unlawful. In contrast to an interference claim, the Ninth Circuit applies the *McDonnell Douglas* burden-shifting framework to retaliation claims under the FMLA.

For a substitution-of-leave denial to constitute interference, employee must be prejudiced. Employee must show that in the future he was unable to use the leave that he was previously forced to use. A "[w]rongful forced FMLA leave" claim "ripens only when and if employee seeks FMLA leave at a later date, and such leave is not available because employee was wrongfully forced to use the FMLA leave in the past." In employee's case, he had not tried to use the leave that employer mistakenly forced him to use. Though employee had the denial, he was not yet prejudiced. So, employer's substitution-of-leave denial did not constitute interference *at that time*. That employer required employee to run FMLA leave and non-FMLA leave concurrently was also not interference. Such a practice, the court explained, is the "default rule." And since parties' collective bargaining agreement was silent on the question, it was permissible under the FMLA for employer to run employee's sick leave concurrently with his FMLA leave.

For retaliation, an employee must establish: (1) he engaged in a protected activity under the FMLA; (2) then he suffered an adverse action; and (3) the adverse action and protected activity were causally linked. In denying summary judgment on the failure-to-promote claim, the court noted that employee was the top candidate based on an exam and interviews. Also, at a meeting to discuss the promotion, a supervisor and a co-worker equal in rank spoke about employee favorably and recommended him for the promotion. He always met or exceeded standards in his performance evaluations and had already been promoted once. In comparison, only a single individual who had neither supervised employee nor worked with him objected on purely subjective reasons. And not only was the employee-HR dispute discussed at the meeting, but the decision-maker admittedly counted it among the two incidents that cost employee the promotion. Further, it troubled the court that an individual in a leadership role at the meeting found the vetting process to be "abnormal." In addition to not getting advance notice that their input would be requested, the individuals whom the decision-maker asked for input were generally not asked for input in past promotion decisions. Even more suspicion was warranted because during one of his interviews for the promotion, employee was questioned about his use of FMLA leave and criticized for how he handled the situation. Finally, when employee learned he was passed over, "[h]is FMLA leave was noted as the reason." Then, later at a deposition, a higher-ranking officer testified – "the basis of the decision not to promote Employee was his fight with the City over the FMLA issue."

Summary judgment of employee's retaliation claim was not appropriate anyway, the court added. "Where the alleged legitimate reason for the adverse action is intertwined with the protected activity itself, i.e., "the way the employee went about the protected activity," it would be inappropriate to determine the issue of pretext on summary judgment." Besides, the court found that the employee-HR emails were not particularly inflammatory. There was no profanity or insulting language. At worst, they were stubborn. But, a harsh, frustrated or protesting tone is to be expected when engaging in similar protected activity. Absent some extreme action, such as violence, illegal threats, or deception that is more than protest directed through appropriate channel – as in employee's case – the protected activity itself cannot be the legitimate reason for an adverse action. If an employee's protest resulting in a conflict could be a legitimate adverse action, it would swallow the right to oppose unlawful activity. It is for a jury to determine whether employee's behavior in opposing the policy exceeded the bounds of decency.

***Rengan v. FX Direct Dealer, LLC*, No. 15-cv-4137, 2017 WL 3382074 (S.D.N.Y. Aug. 4, 2017)**

Employee sued her employer for interference with her FMLA rights after being terminated from her job following childbirth. Employee went on leave and did not return after 12 weeks. Prior to taking her leave, employee had inquired whether she was entitled to take maternity leave for 12 weeks, followed by another 12 weeks of FMLA leave, for a total of 24 weeks. There was evidence that employer May have mistakenly informed employee that she was entitled to 24 consecutive weeks of leave, which was incorrect because employer's actual policy specified that maternity and FMLA leave ran concurrently, which would have required employee to return to work after 12 weeks. The court denied employer's motion for summary judgment, finding that employer failed to provide employee with individualized FMLA notice specific to her situation, that a conspicuously displayed FMLA notice did not suffice as individualized notice, and that employer did not provide employee with a specific date to return to work or risk termination. The court also held that there were genuine issues of material fact whether employer's numerous notice failures to provide accurate information regarding leave policies

prejudiced employee in such a way that caused her to lose her job. The court also held there was a genuine issue of material fact whether employee was prepared to return to work as directed when employer informed her that her FMLA leave had been exhausted.

D. Consequences of Employer Failure to Comply with Individualized Notice Requirements

***Reyer v. St. Francis Country House*, 243 F. Supp. 3d 573 (E.D. Pa. 2017)**

Employee, a maintenance worker who suffered from various respiratory ailments, claimed that employer interfered with his FMLA rights and ultimately, terminated his employment because he requested and took FMLA leave.

Employee took FMLA leave on three occasions: (1) in 2011, he took intermittent leave to obtain treatment for his health conditions; (2) in April 2012, he took leave to care for his ailing father and retroactively requested leave for a weeklong absence due to his own pneumonia; and (3) in January 2013, he took intermittent leave to obtain further treatment for his health conditions. Additionally, he took other leaves not considered to be FMLA leaves. In November 2013, his doctor wrote a note stating he had a five-pound lifting limitation. In December 2013, he was told there were no positions available that could accommodate the lifting limitation, and his employment was being terminated.

Employer filed a motion for summary judgment on employee's interference claim, arguing that there was no evidence that employer ever denied him the benefits he was entitled to receive under the FMLA. Employee contended that employer never provided him with written notice that his leave was being designated as FMLA leave, never informed him of his balance of FMLA time remaining, and never let him know that termination would result if he failed to provide documentation from a physician certifying that he could return to work without restrictions. The court denied summary judgment on the interference claim, stating that evidence in the record could support the conclusion that employer failed in its obligation to provide employee with individual notice required under the FMLA.

With respect to employee's retaliation claim, employer argued employee could not establish a *prima facie* case because he could not show causation: he was terminated nearly a year after first requesting FMLA leave. The court stated that, in a case where an employee engages in multiple protected activities, temporal proximity is not measured from the date when employee first requested leave but instead is measured from the last instance of protected activity. Since employee did not exhaust his 12 weeks of FMLA leave until late December 2012, the court concluded that employee had shown temporal proximity, thereby meeting his *prima facie* burden.

Employer stated its legitimate, nondiscriminatory reasons for terminating employee were: (1) employee exhausted his FMLA leave prior to his termination, (2) the lifting limitation prevented him from performing the essential function of his job, and (3) that the company needed to find a replacement for him to prevent further overtime. In the pretext analysis, the court concluded that Reason #1 could be found to be unworthy of credence in light of its failure to consider employee's eligibility under its more generous leave of absence policy. The court concluded that Reason #2 also failed, as there were genuine issues of material fact as to what the job duties of a maintenance worker were. The court finally concluded that Reason #3 also failed,

as employee's replacement did not start work until two months after employee's termination. On this basis, the court denied summary judgment on the retaliation claim.

***Rutherford v. Peoria Pub. Sch. Dist. 150*, 228 F. Supp. 3d 843 (C.D. Ill. 2017)**

Employee was a middle school custodian who suffered a severe work-related injury when some scaffolding fell on him. He was released to return to work about a month later, but developed additional back issues that prevented him from performing his position, and took leave for approximately two months before his doctor released him to return to work, and he passed a functional capacity evaluation. Employee testified that he presented the medical paperwork to employer two days after receiving it, informing them that he wished to return to work. At no time during employee's leave had employer given him any FMLA notices or paperwork, and their FMLA policy did not state that a certification to return to work was needed. Nonetheless, employer refused to allow employee to return to work despite repeated requests by employee, eventually sending him for two more medical evaluations, and ultimately terminating him over two years later for "abandoning" his position. Employee sued for FMLA interference.

The district court granted employee's partial motion for summary judgment, and denied employer's motion for summary judgment. The court found that since the district did not provide employee with any of the required FMLA notices, and did not inform him of the requirement to obtain a return to work certification it should have allowed him to return to work as soon as he informed employer that he was able to do so. The court also rejected employer's claim that employee's claim was untimely, finding that the correct date for the statute of limitations to begin running was the date employee was informed the district considered him to have abandoned his position, and not when employee first requested to return to work.

***Canigiani v. Banc of Am. Merch. Servs., LLC*, No. 17-cv-61270, 2017 WL 4390170 (S.D. Fla. Oct. 3, 2017)**

Employee filed suit against employer alleging three FMLA claims: Count 1, Interference with FMLA Rights (Failure to Provide FMLA Information); Count 2, Interference with FMLA Rights (Termination); and Count 3, Violation of the FMLA (Retaliation). Employer moved to dismiss Count 1, arguing that no cause of action exists for failure to give the notice required by the FMLA, terming it a "mere technical violation." The court held that, at the pleading stage, employee's allegation was sufficient to withstand a motion to dismiss.

Employer also moved to strike employee's claim for compensatory damages, future pecuniary loss, and lost future earnings capacity under the FMLA in Counts 2 and 3. The court granted the motion to dismiss the claim for "compensatory mental damages" and compensatory damages for embarrassment, anxiety, humiliation, and emotional distress, finding such damages unrecoverable under the controlling cases in the Eleventh Circuit. However, as to the claims for future pecuniary loss and lost future earning capacity, the court denied the motion to strike, noting that under FMLA a court May under some circumstances award front pay as a form of equitable relief.

***Dusik v. Lutheran Child & Family Servs. of Ill.*, No. 16 CV 10812, 2017 WL 1437045 (N.D. Ill. Apr. 24, 2017)**

Employee brought suit against her former employer, Lutheran Child & Family Services of Illinois, under the FMLA for retaliation. After five years of employment, employee learned

that she had a torn ACL and meniscus in her right knee that required surgery. Employee told her employer that her doctor had advised her to take three to six months of leave due to her injury and to recover from surgery. Employee also requested to be updated by her manager about her hours and how much leave she had left. Employer informed employee that her leave was being designated as FMLA leave. However, employer never informed her about the amount of leave that would be counted against her FMLA leave entitled, the amount of leave she had remaining, or that she would be terminated if she did not return to work by a certain date. Nevertheless, employer terminated employee's employment because she exhausted her FMLA leave. Employer did so notwithstanding the policy set forth in its handbook that employees May be granted an unpaid leave of absence of up to six months to attend to personal matters.

Employer filed a motion to dismiss on the grounds that employee had not demonstrated that there was a causal link between her protected activity of taking FMLA leave and the adverse action of her termination and that she could not make such a showing because employer only terminated her upon exhaustion of her FMLA leave. Employee argued that the temporal proximity between the expiration of her leave and her termination and employer's retaliatory animus, which could be inferred from its refusal to keep employee informed about her FMLA leave entitlement and refusal to grant additional leave pursuant to employer's policy, demonstrated a causal link.

The district court in Illinois denied employer's motion to dismiss finding sufficient allegations to show a causal connection between employee's protected activity and the adverse employment action because employee was terminated just as she approached the end of her FMLA leave, employer did not offer her the flexibility it offered other employees, and employer was suspiciously non-communicative with employee.

Summarized elsewhere:
***Saller v. QVC, Inc.*, No. 15-2279, 2017 WL 4347661 (E.D. Pa. Sept. 29, 2017)**

***Rengan v. FX Direct Dealer, LLC*, No. 15-cv-4137, 2017 WL 3382074 (S.D.N.Y. Aug. 4, 2017)**

***Craig v. Charles Town Gen. Hosp.*, No. 3:16-CV-36 (GROH), 2017 WL 2260697 (N.D. W.Va. May 23, 2017)**

***Cleveland v. Jefferson Cnty. Bd. of Educ.*, No. 2:15-cv-01538-JEO, 2017 WL 1806826 (N.D. Ala. May 5, 2017)**

***Molina v. Wells Fargo Bank, Nat'l Ass'n*, No. 2:16-cv-207-DN, 2017 WL 1184047 (D. Utah Mar. 29, 2017)**

1. Eligibility Notice

2. Rights and Responsibilities Notice

Summarized elsewhere:
***Meky v. Jetson Specialty Mktg. Servs., Inc.*, No. 16-CV-1020, 2017 WL 878235 (E.D. Pa. Mar. 6, 2017)**

3. Designation Notice

Summarized elsewhere:
***White v. Metro. Wash. Airports Auth.*, No. 1:16-cv-670 (LMB/IDD), 2017 WL 1823183 (E.D. Va. May 5, 2017)**

***Ashby v. Amscan, Inc.*, No. 3:15-CV-00643-GNS, 2017 WL 939324 (W.D. Ky. Mar. 9, 2017)**

V. Medical Certification and Other Verification

***Trautman v. Time Warner Cable TX, LLC*, No. A-16-CV-1049-LY, 2017 WL 5985573 (W.D. Tex. Dec. 1, 2017)**

Employee was a Workforce Analyst for employer from October 2012 till her termination in April 2015. From 2013 until her termination, employee was frequently absent from work. Some of the absences were FMLA-approved, some were not. In 2015, after a spate of unapproved absences, employee received a written warning for unexcused absences. In February 2015, employee contacted employer's third-party administrator ("Sedgwick") to initiate a claim for intermittent FMLA leave of one hour per week. Several weeks later, employee submitted an updated claim to Sedgwick, requesting intermittent FMLA leave of two hours a day, five days a week. Sedgwick advised employee that the frequency and duration of her claim would be updated effective the date Sedgwick received an updated doctor's certification. On March 2, employee's doctor submitted the certification, and on March 20, Sedgwick approved employee for up to two hours a day, five days a week of leave "from January 14, 2015 through August 27, 2015." Employer also approved time off for employee beyond that which Sedgwick approved. In April 2015, employee contacted employer to let employer know that the babysitter was sick, so she could not come to work, and employer terminated her for excessive absenteeism. Employee filed an action against employer, claiming that the company had interfered with her FMLA rights by failing retroactively to apply her leave that Sedgwick approved on March 20 to absences occurring before March 2, 2015. The court granted employer's motion for summary judgment on her interference claim, stating that employee could not make out an interference claim based on employer's failure to retroactively afford her FMLA leave. Employer's refusal to approve absences occurring prior to Sedgwick's receipt of her doctor's certification did not qualify as FMLA interference. In fact, employer had granted all the medical leave that employee requested and for which she provided medical certification, and even more time beyond that.

Employee also filed a retaliation claim, claiming the company had terminated her in retaliation for her taking leave before March 2 that the company had failed retroactively to consider as FMLA leave. The court also granted employer's motion for summary judgment on her retaliation claim, explaining that her retaliation and interference claims essentially were one and the same.

***Hall-Dingle v. Geodis Wilson USA, Inc.*, No. CV 15-1868 (SRC), 2017 WL 899906 (D.N.J. Mar. 7, 2017)**

Employee commenced New Jersey FLA and FMLA retaliation claims and a NJ FLA interference claim against her former employer, defendant Geodis Wilson USA, Inc., after her termination. Employee alleged that she was terminated for taking two consecutive leaves of absences – one to recover from her shoulder injury under the FMLA and the other to care for her

son's injury under the NJ FLA. Employer moved for summary judgment on all counts; the United States District Court for the District of New Jersey denied the motion.

Employer alleged that employee's termination was based on legitimate, nondiscriminatory reasons. Employer argued that employee did not substantiate her extended absence under NJ FLA and was consequently terminated. In opposition, employee asserted that she properly and legally requested two consecutive leaves of absences under the NJ FLA and FMLA. Employee presented evidence that demonstrated employer failed to give employee an opportunity to cure her incomplete and therefore defective medical certificate as required by the NJ FLA. The court held that whether employee's termination was retaliatory or based on legitimate nondiscriminatory reasons is a triable issue of fact. Accordingly, employer's motion for summary judgment as to the NJ FLA and FMLA retaliation claims was denied.

Similarly, the court denied employer's motion for summary judgment as to the interference claim. The court concluded that, based on the evidence presented, a reasonable jury could find that employer interfered with employee's NJ FLA rights. Thus, there was a genuine issue of material fact as to the interference claim and summary judgment was denied.

Summarized elsewhere:
***Kuehne v. Arlington Heights Park Dist.*, No. 1:15-CV-06525, 2017 WL 1386177 (N.D. Ill. Apr. 18, 2017)**

A. Initial Certification

***Alejandro v. N.Y. City Dep't of Educ.*, No. 15-CV-3346 (AJN), 2017 WL 1215756 (S.D.N.Y. Mar. 31, 2017)**

Employee was employed by a public school district as a parent coordinator. During her employment, she requested intermittent FMLA leave for her own serious health condition. In furtherance of her FMLA request, employee was required to fill out FMLA paperwork. The paperwork originally submitted by employee was deemed insufficient and incomplete. Employer returned the paperwork to employee because it was lacking in "required information," specifically it was missing detailed medical documentation of her condition (no diagnosis) and start and end dates for the leave. The employer gave the employee 21 days to provide the missing information. Employee never submitted any additional information so her leave request was denied. She was terminated one month later for performance reasons. Employee subsequently sued for interference and retaliation under the FMLA. In support of her interference claim, employee argued that employer was prohibited under the FMLA from requesting any follow-up information after she submitted the FMLA paperwork the first time. The court disagreed, noting that the FMLA expressly gave employer the right to request missing information, with the requirement that the missing information be specifically identified. Here, the court held that the missing information was specifically identified by employer. Further, the missing information was the type of information employer was entitled to ask for. Therefore, employee's failure to provide it was a lawful basis for denying FMLA leave. The court also granted employer summary judgment on employee's FMLA retaliation claim at the *prima facie* stage based on absence of causation. The court reasoned that even if there was only one month between her FMLA request and her termination for poor work performance, employee failed to raise a genuine issue of material fact in the face of the multiple counselings and undisputed proof of the series of negative performance and conduct assessments preceding the termination.

Summarized elsewhere:
***Hall-Dingle v. Geodis Wilson USA, Inc.*, No. CV 15-1868 (SRC), 2017 WL 899906 (D.N.J. Mar. 7, 2017)**

B. Content of Medical Certification

Summarized elsewhere:
***Davidson v. Evergreen Park Cmty. High Sch. Dist. 231*, No. 15 C 0039, 2017 WL 2243096 (N.D. Ill. May 23, 2017)**

***Alejandro v. N.Y. City Dep't of Educ.*, No. 15-CV-3346 (AJN), 2017 WL 1215756 (S.D.N.Y. Mar. 31, 2017)**

C. Second and Third Opinions

Summarized elsewhere:
***Curtis v. Nucor Corp.*, No. 3:16CV00009 JLH, 2017 WL 583143 (E.D. Ark. Feb. 13, 2017)**

D. Recertification

E. Fitness-for-Duty Certification

Summarized elsewhere:
***Cooley v. E. Tenn. Human Res. Agency, Inc.*, No. 17-5355, ___ F. App'x ___, 2017 WL 6547387 (6th Cir. Dec. 22, 2017)**

***Cooley v. E. Tenn. Human Res. Agency, Inc.*, 243 F. Supp. 3d 941 (E.D. Tenn. 2017)**

***White v. Metro. Wash. Airports Auth.*, No. 1:16-cv-670 (LMB/IDD), 2017 WL 1823183 (E.D. Va. May 5, 2017)**

F. Certification for Continuation of Serious Health Condition

G. Certification Related to Military Family Leave

1. Certification of Qualifying Exigency

2. Certification for Military Caregiver Leave

H. Other Verifications and Notices

***Diamond v. Hospice of Fla. Keys, Inc.*, 677 F. App'x 586 (11th Cir. 2017)**

Employee, a licensed clinical social worker for a hospice service, received approval for intermittent FMLA leave to care for her elderly parents who suffered from serious health conditions. Employee's mother became seriously ill and employee submitted an FMLA leave request for the following two work days. The leave request was approved the following day. While she was out, the HR Manager requested an updated FMLA medical certification for her parent's serious health condition. Also, while she was out, the management of HR changed. The day employee returned from FMLA leave, the CEO warned employee that if she worked for another company, she would be out of a job. Two days later, the new HR manager sent employee a memo requesting documentation in addition to the medical certification supporting

her unscheduled leave, such as travel receipts, to support the need for intermittent FMLA leave because 30 days' notice was not provided, and that such documentation would be required whenever employee took unforeseeable FMLA leave. That same day, employee's mother was hospitalized, and the following Monday, employee submitted two requests for FMLA leave to care for her parents, for 10 days (two periods of five consecutive work days) over the coming three weeks. Employee returned a day early from her first leave period and requested clarification from the HR manager about the documentation needed, as she had submitted FMLA certification and a doctor's note from her mother's doctor stating she accompanied her mother to an appointment the prior day. The HR manager responded that the doctor's note was sufficient for the prior day, but for other days taken, documents including food, lodging or gas receipts from the city where employee's parents lived showing proof of need were requested. The HR manager also stated that employee's continued unpaid time away from the workplace compromises the quality of care. Two days later, employee listed various receipts and other documents she provided to satisfy her employer's requests for additional documentation, and requested documents reflecting the distinction HR makes between documents needed for foreseeable and unforeseeable FMLA leave. Employee also asked that employer not put undue pressure on her to provide documentation beyond what the FMLA requires. Employee noted she was trying to minimize any negative impact her leave May have by traveling 300 miles each way to her parents' home despite that her mother's doctor recommended care for the entire month. Employee also asked how her leave was compromising the quality of care. The HR manager responded that, based on the documentation employee provided, the days she was out would be coded as FMLA leave. The following day, the HR manager approved the request for 10 days of FMLA leave, and advised employee she May want to conserve her remaining FMLA leave, which was running low. Due to this warning and other comments, employee did not take one of the approved days. Just under three weeks later, the HR manager responded to employee's request regarding how her absences were harming patient care, and five days later, employee was fired, purportedly for poor job performance, with two new reasons stated in addition to those outlined in the explanation of how employee's absences were harming patient care.

The Florida district court granted summary judgment for employer on employee's claims for interference and retaliation, but the Eleventh Circuit reversed and remanded for trial, finding that a reasonable jury could interpret the HR manager's statement that employee's unpaid time away from work compromises the quality of care as a warning that taking further FMLA leave could put employee's job in jeopardy. Additionally, employer's request for gas, food or lodging receipts that had no relation to employee's need for leave, and employing such a policy only for unforeseeable FMLA leave requests, support an inference that employer sought to discourage FMLA leave by making it more difficult to obtain approval. Finally, a jury could conclude employee was prejudiced by the interference, and employee could prove that she suffered monetary loss by driving the 300 miles each way to her parents' home despite the doctor's recommendation for care for the entire month. The Eleventh Circuit also held a jury could infer that employee's termination was causally related to her FMLA leave based on the temporal proximity of employee being fired two weeks after she returned from unforeseeable intermittent leave. Moreover, temporal proximity in addition to employer's more arduous FMLA approval requirements and negative comments about employee's leave corroborated the causal connection. The Eleventh Circuit further stated it was not persuaded employer was entitled to summary judgment because employee did not specifically rebut two of the purported legitimate reasons for her termination. Because the two purported reasons were not listed as cause for disciplinary action, did not alone support discharge, employee was never disciplined for the conduct, and the HR manager negatively commented on employee's use of unforeseeable FMLA

leave and directly connected her FMLA leave to deficiencies in employee's work, coupled with the temporal proximity, a genuine dispute of material fact existed, and precluded summary judgment in employer's favor.

1. Documentation of Family Relationships

2. Notice of Employee's Intent to Return to Work

I. Consequences of Failure to Comply With or Utilize the Certification or Fitness-for-Duty Procedures

Summarized elsewhere:
***Neal v. T-Mobile USA, Inc.*, 700 F. App'x 888 (11th Cir. 2017)**

1. Employee

***Quick v. Wal-Mart Stores, Inc.*, No. 2:16-CV-109, 2017 WL 2422928 (S.D. Tex. June 2, 2017)**

Employee Pamela Quick, 64, began working for Wal-Mart in Portland, Texas in 2013 in the meat department. In March 2014, five months into her employment, she slipped on some ice in the freezer. She was placed on light duty until June 2014, returning to full duty. In December 2014, employee complained to the Personnel Coordinator about her back hurting, apparently not a condition related to her work injuries. She requested a 3-day FMLA leave. Employer referred that request to its FMLA coordinating consultant, Sedgwick. The 3-day leave lasted for two months because, according to employee, employer's Area Manager told her not to return to work until she was 100%, even though another younger male employee worked light duty during some of that same time. Because she failed to provide the medical certification requested by Sedgwick despite two extensions, employee's FMLA leave was denied on January 29, 2015. In early February, employer told employee she needed to return to work. Employee then had her doctor send a letter, stating that employee was not released for full duty until February 11th. When she had not returned by February 15th, she was fired. Employee sued employer for FMLA interference and retaliation claims, among other causes of action. The district court granted in part and denied in part employer's summary judgment motion.

The district court granted employer's summary judgment as to the FMLA interference claim because employee failed to provide the medical certification that employer had a right to request. As for the retaliation claim, employee, according to the court, offered no evidence to support her claim. Therefore, the court granted that portion of employer's summary judgment motion.

2. Employer

***Molina v. Wells Fargo Bank, Nat'l Ass'n*, No. 2:16-cv-207-DN, 2017 WL 1184047 (D. Utah Mar. 29, 2017)**

Employee filed suit against her employer, Wells Fargo Bank, in the Tenth Circuit alleging eight causes of action. The district court denied employer's motion to dismiss for failure to state a claim on four of the causes of action, including employee's claim that employer interfered with her rights under the FMLA. Employer argued that employee's subjective belief that she needed an accommodation was not sufficient because a medical certification was

required. In the alternative, employer argued that even if a certification was not required, employee did not plead sufficient facts that the requested leave was medically necessary. The court disagreed.

The court held that a medical certification is not required under the FMLA, only that employer "may" request it, citing Sixth and Tenth Circuit precedent. When employee requested FMLA leave, employer failed to provide employee notice that a medical certification was required or of the consequences if she did not submit certification. Based on the pleadings, employer did not require certification. As to employer's alternative argument, employee stated facts that she had epilepsy, that she requested a leave of absence because of seizures related to this serious health condition, and employer denied her request.

Summarized elsewhere:
***Rutherford v. Peoria Pub. Sch. Dist. 150*, 228 F. Supp. 3d 843 (C.D. Ill. 2017)**

VI. Recordkeeping Requirements

***Baker v. Goldberg Segalla LLP*, No. 16-CV-613G, 2017 WL 24616 (W.D.N.Y. Jan. 3, 2017)**

Employee, a legal assistant at a private law firm, alleged, *inter alia*, that the defendant law firm discriminated and retaliated against her in violation of the FMLA when it terminated her employment after failing to inform her of the expiration of her FMLA leave. Employer asserted that employee had been granted leave far in excess of the 12 weeks to which she was entitled under the FMLA, and claimed that she had not been the subject of retaliation for her FMLA use, noting that she had been given a raise while on leave. Employer moved to dismiss the complaint for failure to state a claim upon which relief May be granted. The district court denied the motion to dismiss, finding that the complaint raised sufficient questions about the sufficiency of employer's FMLA recordkeeping to raise questions as to whether employer had complied with its obligation under 29 C.F.R. § 825.300(d) and to permit the complaint to survive the motion to dismiss.

[NOTE – Case subsequently dismissed for failure to allege prejudice due to lack of notice or circumstances giving rise to an inference of retaliatory intent (*Baker v. Goldberg Segalla LLP*, No. 16-CV-613-FPG, 2017 U.S. Dist. LEXIS 51957 (W.D.N.Y. Apr. 4, 2017)]

A. Basic Recordkeeping Requirements

Summarized elsewhere:
***Baker v. Goldberg Segalla LLP*, No. 16-CV-613G, 2017 WL 24616 (W.D.N.Y. Jan. 3, 2017)**

B. What Records Must Be Kept

Summarized elsewhere:
***Baker v. Goldberg Segalla LLP*, No. 16-CV-613G, 2017 WL 24616 (W.D.N.Y. Jan. 3, 2017)**

C. Department of Labor Review of FMLA Records

CHAPTER 7.

PAY AND BENEFITS DURING LEAVE

I. Overview

II. Pay During Leave

A. Generally

Summarized elsewhere:
***Dunlap v. United Outstanding Physicians*, No. 15-CV-14022, 2017 WL 395237 (E.D. Mich. Jan. 30, 2017)**

B. When Substitution of Paid Leave is Permitted

1. Generally

2. Types of Leave

a. Paid Vacation and Personal Leave

b. Paid Sick or Medical Leave

c. Paid Family Leave

d. Workers' Compensation or Temporary Disability Benefits

***Fernandez v. Beehive Beer Distrib. Corp.*, No. 12-cv-01968 (TPG), 2017 WL 4155373 (S.D.N.Y. Sept. 18, 2017)**

Employee, a delivery driver, brought suit under the FMLA, 28 U.S.C. § 2601. Employer, a beer manufacturing company, filed an amended answer to the complaint that included a counterclaim seeking to offset any damages award in an amount equal to the workers' compensation payments that employee received during the time period relevant to his claim under the FMLA. Employee moved to dismiss the counterclaim for two reasons. First, employee argued that employer's counterclaim was a mere recitation of employer's affirmative defenses, disguised as a counterclaim. Second, employee argued the counterclaim lacks sufficient specificity. The court denied employee's motion to dismiss employer's counterclaim.

The court found that employer's counterclaim is not duplicative of its affirmative defense. The court reasoned that employer's reference to the workers' compensation payment was for a distinct purpose – to support its claim for offset of any potential damages award. Thus, an offset May be pled as an affirmative defense or as a counterclaim.

Additionally, the court found that employer's counterclaim clearly states an offset against any future damages award. Also, the court found that employer pled sufficient facts to support its claim. The court reasoned that employer proved that employee was not able to resume performing the essential duties of his position during and at the end of his FMLA leave. Also,

employee received workers' compensation payments on the basis of his condition. Thus, employer's counterclaim stated a plausible claim upon which relief can be granted.

e. Compensatory Time

C. Limits on the Employer's Right to Require Substitution of Paid Leave

III. Maintenance of Benefits During Leave

A. Maintenance of Group Health Benefits

1. Generally

Summarized elsewhere:
***Dunlap v. United Outstanding Physicians*, No. 15-CV-14022, 2017 WL 395237 (E.D. Mich. Jan. 30, 2017)**

2. What is a Group Health Plan

3. What Benefits Must Be Provided

4. Payment of Premiums

a. Methods of Payment

i. During Paid Leave

ii. During Unpaid Leave

b. Consequences of Failure to Pay

5. When the Obligation to Maintain Benefits Ceases

a. Layoff or Termination of Employment

b. Employee Notice of Intent Not to Return to Work

c. Employee's Failure to Pay Premiums

d. "Key Employees"

e. Other Circumstances

6. Rules Applicable to Multi-Employer Health Plans

B. Employer's Right to Recover Costs of Maintaining Group Health Benefits

1. When an Employer May Do So

2. How an Employer May Do So

C. Continuation of Non-Health Benefits During Leave

1. Generally

2. Non-Health Benefits Continued at Employer's Expense

3. Non-Health Benefits Continued at Employee's Expense

4. Specific Non-Health Benefits

a. Pension and Other Retirement Plans

b. Lodging

c. Holiday Pay

d. Paid Leave

CHAPTER 8.

RESTORATION RIGHTS

I. Overview

II. Restoration to the Same or an Equivalent Position

***Holton v. First Coast Serv. Options, Inc.*, 703 F. App'x 917 (11th Cir. 2017)**

Employee, a Medicare claims processor, appealed from the district court's grant of summary judgment on her claims for failure to provide reasonable accommodation under the ADA and interference and retaliation under the FMLA. The Eleventh Circuit affirmed, holding that employee did not demonstrate employer's interference with her FMLA rights when she requested to return from her leave on a four hour per day work schedule. The FMLA guarantees an employee returning from FMLA leave the right to return either to the same position that she held when the leave commenced or to an equivalent position. Because employee sought to return on a modified basis, her request was not protected by the FMLA, and employer did not interfere with her FMLA rights as a matter of law. The court of appeal also upheld summary judgment on employee's claim that she was retaliated against for exercising her FMLA rights. The court held that, even assuming that employee established a *prima facie* retaliation case, employee failed to show that employer's reason for terminating her, her failure to report to work was pretextual.

***Bartos v. PDC Energy, Inc.*, No. 1:16-CV-167, __ F. Supp. 3d __, 2017 WL 3224457 (N.D. W.Va. July 28, 2017)**

Employee filed a motion for partial summary judgment and employer filed a motion for summary judgment. Employee alleged retaliation and discrimination in violation of the FMLA.

Following court's precedent, the court held that FMLA retaliation claims are analyzed under the *McDonnell Douglas* framework. The court held that employee has presented sufficient evidence to adequately establish a *prima facie* case of retaliation in violation of the FMLA.

The court observed that it was not contested that employer decided to change employee's job title and functional responsibilities while she was on leave pursuant to the FMLA and that employee did not return from leave to a job title and responsibility of a supervisor after returning from leave. The court held that it was sufficient to establish a *prima facie* case of FMLA retaliation and a genuine dispute existed at to whether the position occupied by employee after returning from leave could be considered as an equivalent position.

As a consequence, the court denied employer's motion for summary judgment with respect to employee's claim for retaliation in violation of the FMLA.

***Cleveland v. Jefferson Cnty. Bd. of Educ.*, No. 2:15-cv-01538-JEO, 2017 WL 1806826 (N.D. Ala. May 5, 2017)**

A district court in the Northern District of Alabama granted a state agency employer's motion for summary judgment. Employee injured herself at work, which injury required multiple surgeries. She requested and received a paid 90 day leave under employer's policy and a concurrent FMLA leave. During her leave, employee applied for disability retirement benefits through the State's retirement system. Eventually, employee resigned her employment during the course of the leave, arguing she was constructively terminated. When employee was unable to secure disability retirement benefits through the State, she asked that employer rehire her. Employer refused. Employee then sued for retaliation under the FMLA, unlawful interference with her FMLA rights, and failure to provide notice of FMLA rights.

Employee based her unlawful interference claim on two theories: (1) that her leave was cut short because she was constructively terminated; and (2) employer failed to restore her to the former position. As to the former claim, the court held that there was no viable interference claim because employee had actually received all 12 weeks of FMLA leave. As to the latter claim, the court held that employee could not establish an FMLA violation because the evidence showed that employee and her doctors had stated in connection with her application for state disability retirement benefits that she was unable to work. Thus, if employee is unable to perform an essential function of a job, employee has no right to restoration to the former position. The district court also observed that even if employee was entitled to restoration rights after the conclusion of the 12 week FMLA leave, employee's interference claim fails because (1) employee made the decision to resign prior to the unlawful conduct that allegedly served as the basis for constructive termination and (2) employee could not meet the elements of constructive termination.

As to the Failure to Give Notice of FMLA rights claim, the court held that there was no violation because employee could not show that employer interfered with any of her FMLA rights as discussed above.

As to the retaliation claim, employee claimed that employer retaliated against her when it failed to reinstate her after she requested that she be hired back after she learned that others who had had been the subject of a reduction in force were rehired. The court concluded that employee could not show unlawful retaliation because, among other things, employee had retired, her former position was no longer vacant after a replacement was hired, and she was never part of the reduction in force and therefore her situation was different than those who were rehired.

Summarized elsewhere:
***Harper v. Fort Bend Indep. Sch. Dist.*, No. H-16-1678, 2017 WL 1881971 (S.D. Tex. May 9, 2017)**

***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

A. General

***Waag v. Sotera Def. Solutions, Inc.*, 857 F.3d 179 (4th Cir. 2017)**

Employee alleged that his former employer, Sotera Defense Solutions, Inc., violated the FMLA by failing to restore employee to his position when he returned from leave, by placing him in a job that was not equivalent to his position prior to going on leave, and by terminating him from his new job because he took medical leave. Employer moved for summary judgment, which the district court granted, and employee appealed.

Employee took medical leave for a hand injury. Employers found a replacement for employee during his time off. Shortly after taking leave, employer faced substantial budget cuts. Therefore, employee was told that when he returned to work, he was to report to a different supervisor and take on a different, albeit similar, position. Eventually, employer's senior management decided they needed to cut costs and that the only way to do this was to lay off employees. Employee was included in the initial group of employees laid off.

The court held that the FMLA does not require an employer to restore an employee returning from leave to his previous position under any circumstance. Rather, restoration of an employee meant that employee could take on his original job or a different job that is "equivalent." Therefore, even though employee had been replaced in his original position, there was no FMLA violation if he was placed in an equivalent position. The court also found that the position he was placed in was equivalent because the salary, the terms and conditions of employment, and employee's title as "Senior Director" were all identical. His duties and responsibilities in his new position were also substantially similar. Employee also attempted to argue that the new job was essentially a "sham" position, which was eventually eliminated a few weeks later. The court found that the position was genuine and not slated for layoffs at the time employee returned from leave. Finally, the court rejected employee's argument that he was terminated in retaliation for taking leave because employee was unable to show pretext. Employer had shown legitimate reasons for terminating employee's position. Therefore, the court affirmed the grant of summary judgment.

***Duncan v. Chester Cnty. Hosp.*, 677 F. App'x 58 (3d Cir. 2017)**

Employee, a radiology technologist at a hospital, sued the hospital for which he worked for FMLA interference and retaliation. The district court entered summary judgment for the hospital and the Third Circuit affirmed. Employee did not get along with the principal radiologist; the tension began when the radiologist complained about employee's poor work performance, resulting in a disciplinary warning. Employee gave his written account of the events to the hospital, but the radiologist believed employee's written account was false, and stopped trusting employee. Eight months later, the radiologist again complained about employee contaminating a sterile tray, resulting in a final disciplinary warning, which was withdrawn and replaced with a non-disciplinary corrective action. Employee met with the administrative

director of radiology and expressed frustration about his treatment in the workplace and stated he wanted to leave the department or work part time, and was considering returning to school. Employee also requested and was approved for FMLA leave to have knee-replacement surgery. The radiologist refused to meet with employee for an HR conciliation session. Employee later received another non-disciplinary corrective action for conduct occurring in prior months. The administrative director met with employee to let him know any further infractions could result in discipline. Employee again stated he wanted to change departments and that he May not return to work. When he left the meeting, employee gathered his personal items and slammed a filing cabinet shut, resulting in HR terminating employee's work passwords, per hospital policy. Later that day, employee told HR over the phone he had not resigned, despite his conduct, and another meeting was scheduled. In that meeting, employee again stated he did not want to work in radiology and wanted to work part-time and May return to school. He also refused to confirm whether he had obeyed HR's directive not to air his workplace grievances with other employees. When the meeting ended, employee said "Goodbye, it's been a great run." HR told him not to report back to work until further notice. Employee was then fired, but the letter terminating his employment indicated that if his knee surgery was performed by the end of the month following his termination, he was still entitled to 12 weeks' FMLA leave with health insurance coverage, despite his termination. Employee had already canceled his surgery, and never commenced FMLA leave.

Because employee never took leave, the hospital did not interfere with his right to reinstatement upon return from leave. Additionally, even though employee was terminated, the hospital gave employee the option to take FMLA leave if it was taken in the month following his termination, thus, there was no interference with employee's leave. There was also no causal connection between employee invoking his right to FMLA leave and his termination. The temporal proximity between the FMLA protected activity and employee's termination thirty-four (34) days later was not "unduly suggestive" to infer causation. The purported pattern of antagonism employee sought to prove was not sufficient to create a triable issue of fact. A corrective measure taken days after employee's request for leave (because the administrator was absent from work) was in response to his contaminating a sterile tray, which occurred prior to his request for leave. Employee also pointed to the radiologist's dislike of employee, but employee failed to dispute that the radiologist neither issued the corrective measure nor knew about his request for leave. Moreover, because the corrective actions were in response to conduct that occurred prior to employee's request for leave, and meetings with employee were not to antagonize employee, but to discuss employee's performance and desire to work in a different department, there is no triable issue on causation.

***Aberman v. Bd. of Educ. of City of Chi.*, 242 F. Supp. 3d 672 (N.D. Ill. 2017)**

Employee, a teacher, sued her former employer for allegedly interfering with her rights under the FMLA. Specifically, employee alleged that employer's failure to reinstate her to her tenured teaching position upon being released to work violated her rights under the FMLA. Defendants moved to dismiss employee's claims.

On a motion for summary judgment, the court found that although employee was generally entitled to reinstatement to the same position and benefits she had just before she took the FMLA leave, employee's right was not absolute. The court noted that under FMLA, an employer May refuse to restore an employee to their former position when restoration would confer a right, benefits or position of employment that the employee would not have been

entitled to if the employee had never left the workplace. Accordingly, because employee was terminated as a result of a legitimate layoff plan having nothing to do with employee's leave, the court dismissed employee's FMLA interference claim.

***Blackett v. Whole Foods Mkt. Grp., Inc.*, No. 3:14-CV-01896 (JAM), 2017 WL 1138126 (D. Conn. Mar. 27, 2017)**

Employee injured himself in employer's parking lot and took time off on two separate occasions. Each time, employer failed to designate employee's time off as FMLA leave. Employee took a third leave. During his time off, employee was notified that his time off was being designated as FMLA leave, and the available 12 weeks under FMLA would be exhausted within a week. Thereafter, his leave would continue under the state law as CT FMLA, but unprotected. Employee returned to work at the completion of the CT FMLA. Upon his return, employee was informed his position was no longer available, and eventually terminated.

Employee sued employer for interference and retaliation under the FMLA. Specifically, employee alleged that employer's failure to provide the required FMLA notices disabled him from exercising his right to reinstatement under the FMLA. Employee also alleged he was terminated in retaliation for taking a leave under the FMLA. Employer moved to dismiss employee's claims.

Employer argued that even though it failed to provide employee with the requisite notices, employer did not interfere with employee's leave rights because employee received the full 12 weeks available under FMLA. The court disagreed. The court reasoned that had employee received timely notices designating employee's leave under FMLA, employee might have been able to medically structure his leaves differently or might have returned to work sooner in order to avail himself of the right to be reinstated under the FMLA. The court also rejected employee's retaliation claim holding that employee failed to allege a causal connection between taking the leave of absence and his termination.

Summarized elsewhere:
***Bush v. Compass Grp. USA, Inc.*, 683 F. App'x 440 (6th Cir. 2017)**

***Herndon v. U.S. Bancorp Fund Servs., LLC*, No. 1:15-cv-751, 2017 WL 4349057 (S.D. Ohio Sept. 29, 2017)**

***Breaux v. Bollinger Shipyards, LLC*, No. CV 16-2331, 2017 WL 1109566 (E.D. La. Mar. 23, 2017)**

***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

***Gardenhire v. Manville*, No. 15-cv-4914-DDC-KGS, 2017 WL 445506 (D. Kan. Feb. 2, 2017)**

B. Components of an Equivalent Position

Summarized elsewhere:
***Bush v. Compass Grp. USA, Inc.*, 683 F. App'x 440 (6th Cir. 2017)**

***Aberman v. Bd. of Educ. of City of Chi.*, 242 F. Supp. 3d 672 (N.D. Ill. 2017)**

***Blackett v. Whole Foods Mkt. Grp., Inc.*, No. 3:14-CV-01896 (JAM), 2017 WL 1138126 (D. Conn. Mar. 27, 2017)**

***Breaux v. Bollinger Shipyards, LLC,* No. CV 16-2331, 2017 WL 1109566 (E.D. La. Mar. 23, 2017)**

1. Equivalent Pay

2. Equivalent Benefits

3. Equivalent Terms and Conditions of Employment

***Downing v. Dep't of Fin. & Admin.*, No. 4:15-cv-570-DPM, 2017 WL 1433305 (E.D. Ark. Apr. 20, 2017)**

Employee worked for a state agency in a role that involved handling, distributing, and selling surplus property. About 60% of his time was spent performing desk work – dealing with internet-based sales – and 40% was spent performing physical work – stocking the warehouse, inspecting property, and driving delivery trucks. Employee took 12 weeks of FMLA leave for a double hip replacement surgery. During that time, his employer trained another employee to fill in. The employer was pleased with the replacement employee's efficiency, and decided to rotate employee and the other employee on a week-on, week-off basis between the warehouse and web duties. However, employee's doctor determined that he could not perform warehouse work five days in a row (only two days per week) and that he had a lifting restriction. The employer then terminated employee, asserting that he could not perform the essential functions of his job with his restrictions. Employee sued, including for violations of the FMLA, the ADA, and the Rehabilitation Act, asserting that employers interfered with his leave rights, failed to reinstate him, and retaliated against him for taking protected leave. He sued his employer and two managers in their individual and official capacities.

Employee filed a partial motion for summary judgment, and employers filed a motion for summary judgment. The district court held that a jury would need to decide employee's failure-to-reinstate claim, as there was an issue regarding whether employee was reinstated to the same or equivalent position given the change in his schedule. The court held that employee's other two FMLA claims failed as a matter of law. Employers did not interfere with employee's FMLA rights, as he requested leave, received it, and returned to work. Nor did employers retaliate against employee, as there was no evidence he was fired for taking leave. The individual claims failed because, even if employee prevails on his failure-to-reinstate claim, the FMLA reinstatement law is not so clearly established that reasonable managers would have known that.

Summarized elsewhere:
***Downing v. Dep't of Fin. & Admin.*, No. 4:15-cv-570-DPM, 2017 WL 1433305 (E.D. Ark. Apr. 20, 2017)**

***Ejiogu v. Grand Manor Nursing & Rehab. Ctr.*, No. 15CV505 (DLC), 2017 WL 1184278 (S.D.N.Y. Mar. 29, 2017)**

***Hostettler v. Coll. of Wooster*, No. 5:15CV1601, 2017 WL 1166130 (N.D. Ohio Mar. 29, 2017)**

***Bolek v. City of Hillsboro*, No. 3:14-CV-00740-SB, 2017 WL 627218 (D. Or. Feb. 13, 2017)**

III. Circumstances Affecting Restoration Rights

***Skrynnikov v. Fed. Nat'l Mortg. Ass'n*, 226 F. Supp. 3d 26 (D.D.C. 2017)**

Employee was employed by Fannie Mae as a Senior Financial Analyst. One of his duties was to complete information assessments on executive compensation. In March of 2009, United States Senator Grassley, requested an assessment. Employee became concerned with the accuracy of the information given to him and shared these concerns with his supervisor. After speaking with his supervisor a second time, the supervisor became angry. Thereafter, the supervisor disciplined him for poor job performance. On July 9, 2009, employee requested FMLA leave for stress related conditions associated with his relationship with his supervisor. Employee was granted FMLA for 12 weeks, and then an extension for a total of 16 weeks, pursuant to the District of Columbia FMLA. Thereafter, employee represented that he was able to return to work on October 26, 2009. However, on October 21, he requested to use one week's vacation to recover from a rib injury. Employer requested a doctor's clearance to return to work. On October 30, he sent the third party administrator a return to work certification for his return on November 2. On the same date, employee received notice that he was approved for FMLA until October 29 and short term disability through November 1. On October 30, employee received a letter from his employer stating that he had exhausted his protected leave, and his position would not be held open. After his short term disability expired, he was terminated. Employee filed a complaint in the district court for the D.C. Circuit, alleging interference.

On employee's motion for summary judgment, he argued that employer interfered with his right to reinstatement at the end of his protected leave. Employer argued that employee would have been fired anyway for poor performance and because his job was being automated due to budget cuts, and there was no alternate position for him. The court found that employer provided sufficient evidence that it would have fired him anyway. The court also accepted employer's argument that employee lacked the proper return-to-work certification and, therefore, was unable to return to work when his leave was exhausted. Employee submitted his paperwork after his protected leave expired. A juror could find that employee was unable to return to work when his leave expired.

On employer's cross-motion, court denied summary judgment. In response to employer's argument that it did not restore his position based on legitimate reasons, employee argued that employer's reasons for termination were pretext for retaliation under the False Claims Act. Employer additionally argued that employee could not succeed on his FMLA claim because, pursuant to the D.C. municipal regulations, employee did not show proper return to work certification before his leave was exhausted. The court found that there was nothing in the statute to indicate that a request based on a new type of injury automatically triggered return-to-work certification requirements. The court rejected employer's argument that it could automatically apply FMLA leave for his rib injury.

Summarized elsewhere:
***Cleveland v. Jefferson Cnty. Bd. of Educ.*, No. 2:15-cv-01538-JEO, 2017 WL 1806826 (N.D. Ala. May 5, 2017)**

A. Events Unrelated to Leave

Summarized elsewhere:
<u>*Calaman v. Carlisle HMA, LLC*, No., 1:16-CV-116, 2017 WL 1105127 (M.D. Pa. Mar. 24, 2017)</u>

1. Burden of Proof

<u>*Rodriguez v. Akima Infrastructure Servs., LLC*, No. 16-cv-3607-PJH, 2017 WL 2214612 (N.D. Cal. May 19, 2017)</u>

Employee brought suit against Akima Infrastructure Services, LLC where she was a former Recruiter/Employment Specialist. Employee alleged an interference claim in violation of the FMLA and that she was wrongfully terminated in violation of public policy (i.e., for violation of the FMLA). Employee had requested a leave of absence due to her pregnancy. She was approved for FMLA leave by employer. However, while she was on leave, changes occurred in the business, which caused employer to lose significant revenue. Employer's general manager explored several options to address the loss of revenue, but eventually determined that the most practical and financially sound solution was to eliminate employee's position as the company was overstaffed. Therefore, employee was notified, while she was on leave, that she would be terminated.

Employer filed a motion for summary judgment as to all claims. Employer argued that it did not wrongfully deny employee's reinstatement following her leave because her position was eliminated. The court agreed, and held that, while the FMLA creates a statutory right to reinstatement after taking FMLA leave, it is not without limits. If an employee is laid off or the employment is terminated during the course of taking FMLA leave, then employer's obligation to reinstate ceases. Employer carries the burden of proof of showing that employee would not have been employed in the same position even if she had not taken FMLA leave. Here, the court recognized that employer explored several options to address the loss of revenue, but that eliminating employee's position made the most financial sense. Therefore, employer met its burden.

The court also held that employee's wrongful termination claim failed because there was no underlying FMLA violation. The claim was based on a violation of public policy, but employer had not violated the law. Therefore, the court granted employer's motion for summary judgment as to employee's claims.

2. Layoff

<u>*Sommerville v. Schenker, Inc.*, No. 2:16-CV-10765, 2017 WL 6621529 (E.D. Mich. Dec. 28, 2017)</u>

Employee worked for employer and its predecessors for more than 35 years. In April 2013, employee assumed the responsibilities of a Global Account Manager ("GAM"). In July 2014, employee requested FMLA leave to recover from scheduled hernia surgery. On July 7, 2014, employer's leave of absence administrator confirmed employee's leave for July 8-16, 2014 and subsequently extended his leave until July 21. Employee returned to work on July 22. In October 2014, employer tasked Daniel Bergman, Senior Vice President with Key Account Management and Sales for the Region Americas, with reducing the number of positions

in the company. To fulfill this task, Bergman relied on the "best and few" data from employer's salesforce.com database. This database generated "best and few" data based on the GAM's inputs of future business opportunities with the highest potential to materialize into future business for employer. On November 7, employer terminated employee, providing as its reason the company's reduction in workforce. Employee sued employer for FMLA retaliation, and employer filed a motion for summary judgment.

The court said the nearly four months between employee's return from leave and the adverse employment action was not sufficient, in itself, to show causation. But even if temporal proximity had sufficiently established employee's *prima facie* case, employer offered a legitimate, non-discriminatory reason for terminating him. Employee contended that the "best and few" data, on which Bergman relied, created a misleading picture of employee's sales performance. The court rejected this argument, citing the "honest belief" rule. If an employer honestly believes its reason for terminating an employee, an employee cannot show pretext simply by demonstrating that it is incorrect. The court granted employer's motion for summary judgment.

***Foruria v. Centerline Drivers, LLC*, No. 116CV00328EJLREB, 2017 WL 5492196 (D. Idaho Nov. 6, 2017)**

Employee, a commercial truck driver, alleged FMLA interference and retaliation after his employers terminated him during the pendency of his FMLA leave. The district court granted employers' motions for summary judgment on both claims.

Employer had placed employee on assignment with another trucking company. Following its standard practice, employer ran a motor vehicle report while employee was on FMLA leave. The report revealed employee had accumulated more "points" than permitted under employers' safety policies, and they terminated his employment. Employee alleged he was terminated for taking FMLA leave. The court analyzed employee's claim as an FMLA interference claim and held employee failed to establish his *prima facie* case. The evidence showed he was no longer eligible to be a driver under employers' policies. The court further noted that employee was unable to return to work at the expiration of his FMLA. Thus, employee could not succeed on his FMLA interference claim, notwithstanding his inability to establish a *prima facie* case. The court also held employers were entitled to summary judgment on the FMLA retaliation claim because employee did not claim he opposed any practice made unlawful under the FMLA.

***Saari v. Mitre Corp.*, No. 15-3295 (MAS) (DEA), 2017 WL 1197756 (D.N.J. Mar. 30, 2017)**

Employee worked as an engineer for a non-profit sponsored by the federal government. Initially, he performed simulation and modeling work supporting the United States Army. When the Army base that employee supported closed, he declined a relocation package to Maryland, where he could continue in the same role. Instead, he chose to be transferred to a different position performing substantially different work. In 2011, employee's employer conducted performance evaluations in which employees were "laddered," with individuals ranked relative to their peers and given scores from 1 (highest) to 3 (lowest). This meant that even employees with positive reviews could receive 3 ratings. When employee received his reviews in 2011 and 2012, he ranked in the bottom 10% of employees, leading him to receive 3 ratings despite positive feedback. Employee took four FMLA leaves starting in August 2010. Employee's 2011

evaluation incorporated a comment made in his self-evaluation, referencing a degenerative eye disease that he had that limited his vision and required at least one more operation. In 2013, the employer conducted a reduction in force ("RIF"), covering all 105 employees who received a 3 rating in their 2012 review. Employee sued his employer and two individuals, alleging violations of the FMLA and the New Jersey Law Against Discrimination, and breach of contract.

Employers filed a motion for summary judgment, which the district court granted. The court rejected the FMLA interference claim, as no benefits were withheld from him. It rejected his FMLA entitlement claim, determining that employers had demonstrated that employee would have been terminated in the RIF even if he were not on FMLA leave. With respect to employee's claim of a mixed-motive FMLA violation, the court held that the employee was discharged absent any consideration of his FMLA leave, and that there was no evidence that his 3 rating reflected animus. His retaliation claim was also rejected for failing to meet his *prima facie* burden of establishing a causal relationship between his FMLA leave and termination.

Summarized elsewhere:
***Charles v. Air Enters., LLC*, 244 F. Supp. 3d 657 (N.D. Ohio 2017)**

3. Discharge Due to Performance Issues

***Wen Liu v. Univ. of Miami Sch. of Med.*, 693 F. App'x 793 (11th Cir. 2017)**

Employee, an Asian female of Chinese national origin, appealed *pro se* litigant in the 11th Circuit of Florida against summary judgment in favor of her former employer the University of Miami School of Medicine. Employee argued that the district court erred by granting summary judgment on her race, sex, and national origin claims as well as her retaliation claim under Title VII of the Civil Rights Act. She further argued the district court erred in granting summary judgment on several of her claims under the FMLA and in denying her request for a discovery extension but the court of appeal denied her claim as the district court did not abuse its discretion regarding the discovery deadline.

The court of appeal rejected employee's claim that the district court erred by granting summary judgment as to her interference and retaliation claims under the FMLA. Employee's claims were predicated upon her former employer's denial of her March 2011 request for an extension of her special review to take leave. On appeal, employee abandoned her interference claims regarding the March 2011 request and did not challenge the finding she filed her claim after the two-year statute of limitations for FMLA claims nor argued her claims were subject to the three-year statute of limitations imposed for willful violations. Finally, employee failed to make a *prima facie* showing of retaliation on her allegation her former employer retaliated against her for taking FMLA leave in October 2012. Employee could not show her termination was casually related to her protected leave because she was given written notice of her termination on October 7, 2011 and took FMLA leave in November 2012.

***Godwin v. Corizon Health*, No. 16-00041-B, 2017 WL 1362033 (S.D. Ala. Apr. 10, 2017)**

Employee worked as a nurse at various correctional facilities, working for a private employer that provided such services by contract. After she contracted the flu and pneumonia, employee took intermittent FMLA leave between December 2013 and early February 2014. She then took continuous FMLA leave between February 6 and April 28, 2014. Company policy requires that when an inmate fills out a form requesting to see a doctor, the on-call nurse must

assess the inmate in a screening room or other designated area before the inmate sees a doctor. The nurse must also be accompanied by a corrections officer. In January 2014, an inmate submitted a grievance claiming that he made a request to see a doctor while employee was on duty, but she did nothing in response. Her employer investigated, including by receiving a statement from and interviewing the corrections officer on duty and reviewing security camera footage. All confirmed that employee did not attend to the inmate. Employee herself asserted that she assessed the inmate while he was still in his cell, through the door, in violation of policy. Her employer determined that she failed to perform her patient assessment as required and fraudulently completed the inmate's chart to cover up this fact. As the employer had a policy not to terminate employees while they were out on leave, employee was the terminated the day she returned from FMLA leave. Employee sued, alleging retaliation in violation of the FMLA, Title VII, and 42 U.S.C. § 1981.

Employer filed a motion for summary judgment, which the district court granted. The court held that while employee established a *prima facie* case of retaliation based on the close temporal proximity of her returning from FMLA leave and being terminated, she failed to establish that her employer's stated reason for terminating her – that falsification of medical records was grounds for immediate termination – was pretextual. Given the employer's policy to not terminate people until they returned from leave, the temporal proximity alone was insufficient.

***Weaver v. Bd. of Educ. of City of Chi.*, 76 N.E. 3d 811 (Ill. App. 2017)**

Employee Mary Weaver, a school principal, filed a Petition for Review of a Final Administrative Order of the Board of Education of the City of Chicago with the Illinois Appellate Court. Employee was dismissed by Employer Board because of job performance while she was on FMLA leave. Because there was no administrative hearing, the Court accepted the writ under a limited scope. When first informed of her dismissal by the Board, employee's position was that no dismissal hearing could be held while she was on protected leave under the FMLA. However, the Court agreed with employee's decision to abandon that argument in her Petition. The court briefly noted that employer had correctly informed employee that the FMLA did not protect employees on FMLA leave from terminations for non-FMLA reasons, including job performance. The court pointed to two cases supporting employer's position: *Simpson v. Office of the Chief Judge*, 559 F.3d 706, 714-15 (7th Cir. 2009) (employers' conduct in terminating employee's employment while employee was on medical leave did not violate FMLA because charges of wrongdoing leveled against employee justified her termination, regardless of her leave); *Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 805 (7th Cir. 2001) ("an employee May be fired for poor performance when she would have been fired for such performance even absent her leave"). The second of employee's arguments was not FMLA related but instead based on notice of the hearing, which also failed. The court affirmed employer's dismissal of employee.

4. Other

***Greene v. Railcrew Express, LLC*, No. 4:16-CV-747-SNLJ, 2017 WL 4339509 (E.D. Mo. Sept. 29, 2017)**

In connection with shoulder surgery, employee took a full twelve weeks of FMLA leave. At the conclusion of the twelve weeks, employee's doctor released employee to return to work

with three restrictions. Employer maintained that the restrictions prevented employee from performing his job duties. Further, there were six reasons that employer could not accommodate the restrictions. As a result, employer did not restore employee to work but rather terminated employee's employment.

Employee filed a lawsuit alleging that employer retaliated against him in violation of the FMLA when terminating his employment at the end of his unpaid leave period. Employer moved for summary judgment. Employee did not file an opposition. Having to deem the facts alleged in the summary judgment motion as uncontroverted, the court granted the motion.

The court granted summary judgment because employee could not establish that he suffered an adverse action and that there was a causal connection between his action and the adverse employment action. As to the no adverse action, the court ruled that the termination was not an adverse action. The FMLA entitled employee to restoration only if he was able to perform the essential functions of his job. The restrictions expressly precluded employee from performing some of these essential functions, and thus employer was not obligated under the FMLA to accommodate employee's restriction. As to the causal connection, the court concluded that the termination was not "because" employee took FMLA leave but rather because employee could not perform his job duties at the end of his leave period.

B. No-Fault Attendance Policies

Summarized elsewhere:
***Stein v. Atlas Indus., Inc.*, No. 3:15CV00112, 2017 WL 2720339 (N.D. Ohio June 23, 2017)**

C. Employee Actions Related to the Leave

***Cooley v. E. Tenn. Human Res. Agency, Inc.*, 243 F. Supp. 3d 941 (E.D. Tenn. 2017)**

Employee appealed an order granting her employer's motion for summary judgment on her retaliation claim under the FMLA. The district court concluded employee had not met her burden of establishing that employer's stated, nondiscriminatory reason for firing her was pretextual. Employee worked for employer as a van driver, transporting elderly and disabled patients. Because her job required assisting some of these passengers, including those in wheelchairs, in getting into and out of the van, the job required the ability to lift up to 50 pounds without assistance. Employee requested and received FMLA leave from employer to undergo back surgery. Her leave was set to expire on August 12, 2015. Because employee sought to return to work from a job-impairing injury, employer required her to first undergo a medical examination and provide a fitness-for-duty certification. To conduct employee's examination, employer hired Dr. John McElligott, who was on the United States Department of Transportation's ("DOT") National Registry of Certified Medical Examiners. During the examination, employee admitted she was taking a narcotic-pain medication. Based on this admission, Dr. McElligott deemed her unfit to return to work, due to safety-sensitive issues. Employer then terminated employee because she could not pass the fitness-for-duty test. At her termination meeting, employee became highly emotional.

The district court ruled that employee met her burden to establish a *prima facie* case of FMLA retaliation. The temporal proximity of her firing in relation to her exercise of her FMLA rights might suffice to establish a causal connection. However, under the *McDonnell Douglas* burden-shifting framework, employer met its burden of providing a legitimate, non-

discriminatory reason for firing her. The court of appeals agreed with the district court's decision, stating, "[w]e have held that a defendant can meet its burden of articulating a legitimate, nondiscriminatory reason in FMLA retaliation cases when it 'fires an employee who is indisputably unable to return to work at the conclusion of the 12-week period of statutory leave.' *Edgar v. JAC Prod., Inc.*, 443 F.3d 501, 506–07 (6th Cir. 2006)." Employee contended that employer's expressed reason for firing her was pretextual. The court of appeals of rejected all of employee's arguments. Employee alleged employer terminated her without consulting her immediate supervisor. The court of appeals stated that, while this was proven to be true, it did not demonstrate that employer did not terminate employee for its proffered reason. Employee alleged that employer did not allow her to take 90 days of unpaid leave. The court of appeals stated that, while employer did indeed have a leave-without-pay policy, it required that an employee apply for it, which employee did not do. Employee alleged that Dr. McElligott contradicted her own physician, who had released her to return to work. The court of appeals stated employer was within its rights to rely on Dr. McElligott's medical opinion. Unlike Dr. McElligott, employee's physician was not on DOT's National Registry of Certified Medical Examiners. Finally, employee alleged that in an interrogatory response, employer identified an additional reason for firing her that was not included in her separation notice: insubordination. But, as the district court had explained, the separation notice was prepared prior to the termination meeting where employee's insubordination occurred. The court of appeals affirmed the decision to grant summary judgment.

Summarized elsewhere:
***Aberman v. Bd. of Educ. of City of Chi.*, 242 F. Supp. 3d 672 (N.D. Ill. 2017)**

***Blackett v. Whole Foods Mkt. Grp., Inc.*, No. 3:14-CV-01896 (JAM), 2017 WL 1138126 (D. Conn. Mar. 27, 2017)**

***Calaman v. Carlisle HMA, LLC*, No., 1:16-CV-116, 2017 WL 1105127 (M.D. Pa. Mar. 24, 2017)**

1. Other Employment

2. Other Activities During the Leave

***Smith-Megote v. Craig Hosp*, 229 F. Supp. 3d 1224 (D. Colo. 2017)**

Employee, a former employee of Craig Hospital, requested leave to travel to the Philippines to care for her mother. Her mother died shortly into her approved leave. Employee did not request bereavement leave or extended leave. She stayed in the Philippines for three weeks and then flew to Spain to check on her sister. She then notified the Hospital that she would like to return to work. She learned that she had been terminated by the Hospital for missing too many shifts before and after her mother's death. She filed suit for FMLA interference and retaliation, and the Hospital filed for summary judgment.

Courts have consistently held that FMLA is not available for time spent in mourning a family member's death. Employee simply took it upon herself to stay away from work. Employee argued that she was entitled to the leave until the date originally approved by the hospital for self-care. The court found no evidence of any self-care entitlement and rejected employee's estoppel argument because employee had prior awareness that FMLA leave did not apply to bereavement, meaning there was no interference with FMLA leave. Similarly, there

was no FMLA retaliation because employer established a legitimate, non-retaliatory reason for the adverse employment action.

3. Reports by Employee

4. Compliance With Employer Requests for Fitness-for-Duty Certifications

***Ariza v. Loomis Armored US, L.L.C*, 676 F. App'x 224 (5th Cir. 2017)**

Plaintiff armored truck driver alleged, *inter alia*, that employer interfered with her exercise of rights under the FMLA when it failed or refused to restore her to the same or an equivalent job on her return from FMLA leave. Prior to her use of FMLA leave, employee had been employed as an evening vault supervisor; when employee attempted to return to work, she failed to provide sufficient information to obtain return-to-work certification from employer's company physician. The case was tried to a jury, which returned a verdict for employer on all counts. Employee appealed on the grounds that, *inter alia*, the jury had plainly erred when it found that employer had not failed or refused to restore employee to her same or equivalent job on her return from FMLA leave.

The court of appeals affirmed the judgment of the district court. It found that, with regard to employee's FMLA claim, employer had demonstrated at trial that it had made a concerted effort to return employee to her position as vault supervisor and that, had employee obtained clearance to return to work from a neurologist, she would have been reinstated to her previous position. The court further found that the evidence at trial demonstrated that employee had failed to comply with employer's return to work protocol and that, had she done so, she would have been reinstated.

Summarized elsewhere:
***Rutherford v. Peoria Pub. Sch. Dist. 150*, 228 F. Supp. 3d 843 (C.D. Ill. 2017)**

5. Fraud

D. Timing of Restoration

IV. Inability to Return to Work Within 12 Weeks

***Wevodau v. Commonwealth of Pa.*, 227 F. Supp. 3d 404 (M.D. Pa. 2017)**

Wevodau was an employee of Commonwealth of Pennsylvania. Employee brought an action against the Commonwealth, the department in which he worked, and his supervisor, alleging violation of the Pennsylvania Whistleblower Act and Family and Medical Leave Act (FMLA) when he was placed on involuntary paid administrative leave after attempting to return to work following a permitted medical leave. Employer moved to dismiss the FMLA retaliation claim. On January 4, 2017, the court granted employer's motion. Presently before the court is employee's motion for reconsideration as to the dismissal of his FMLA retaliation claim.

Employer contended that employee failed to state an FMLA retaliation claim because: (1) paid administrative leave does not qualify as an adverse employment action; (2) employee waited five weeks after the expiration of his FMLA leave to seek reinstatement, and employees are subject to termination as of the first day after FMLA leave has expired should they not return

to work; and (3) employee has not pleaded facts to support that his placement on administrative leave was causally related to his FMLA leave.

Employee argued that the court made an error of law in dismissing employee's FMLA retaliation claim for not returning to work at the end of the twelve weeks of leave, because the strict twelve week requirement only applies to FMLA interference claims, not FMLA retaliation claims. The court agreed with employee. "The nature of retaliation claims distinctly focuses on the employer's conduct and motivations for termination. Therefore, an employee is not precluded – as a matter of law – from bringing a retaliation claim simply because she exceeded the twelve-week FMLA entitlement." *Lupyan v. Corinthian Colls. Inc.*, 761 F.3d 314, 324-25 (3d Cir. 2014). The court had not addressed causation in its January 4, 2017 ruling but said it would turn to it here. The court was neither convinced by employee's claim that temporal proximity demonstrated causation nor by his statement that he was not required to establish a *prima facie* retaliation claim at the motion to dismiss stage. The court stated, "there are simply no facts pleaded in the complaint from which the court, even at this early stage of the litigation, can plausibly infer causation." Employee's motion for reconsideration was denied.

***Hostettler v. Coll. of Wooster*, No. 5:15CV1601, 2017 WL 1166130 (N.D. Ohio Mar. 29, 2017)**

Employee was diagnosed with postpartum depression and separation anxiety. Her employer granted an extended maternity leave and a part time schedule although her position was a fulltime position. When employee would not or could not return to a full-time schedule, employer terminated employee's employment. Employee filed suit for, among other things, FMLA interference and retaliation.

The court granted summary judgment in favor of employer. Employee's FMLA interference and retaliation claims failed because employer provided employee with maternity leave and a part-time schedule that exceeded the FMLA requirements and the FMLA does not require the employer to accommodate a continued part-time schedule.

***Wilson v. Dep't of Prop. Mgmt.*, 220 So. 3d 144 (La. App. 2017)**

Employee had appealed her termination from the Department of Property Management for the City of New Orleans. The appeal took place through the Louisiana Civil Service Commission. The Commission reinstated employee and employer appealed. Employee had taken leave for medical treatment, but eventually she exhausted her FMLA leave. Soon after, she was terminated by employer after having been gone for approximately three months. The court held that the Commission's reinstatement of employee was not erroneous. The court and the Commission pointed out that employee still had sick and annual leave available after she had exhausted her FMLA leave. She also had a doctor's note that stated she was able to return to work with certain precautions. Based on these two facts, the court held that the FMLA allows employees, who are not permanently disabled, to tack on sick and/or annual leave after exhaustion of FMLA leave.

Summarized elsewhere:
***Bush v. Compass Grp. USA, Inc.*, 683 F. App'x 440 (6th Cir. 2017)**

***Foruria v. Centerline Drivers, LLC*, No. 116CV00328EJLREB, 2017 WL 5492196 (D. Idaho Nov. 6, 2017)**

***Cleveland v. Jefferson Cnty. Bd. of Educ.*, No. 2:15-cv-01538-JEO, 2017 WL 1806826 (N.D. Ala. May 5, 2017)**

***Baker v. Goldberg Segalla LLP*, No. 16-CV-613-FPG, 2017 WL 1243040 (W.D.N.Y. April 5, 2017)**

***Calaman v. Carlisle HMA, LLC*, No., 1:16-CV-116, 2017 WL 1105127 (M.D. Pa. Mar. 24, 2017)**

V. Special Categories of Employees

A. Employees of Schools

B. Key Employees

1. Qualifications to Be Classified as a Key Employee

2. Standard for Denying Restoration

3. Required Notices to Key Employees

a. Notice of Qualification

b. Notice of Intent to Deny Restoration

c. Employee Opportunity to Request Restoration

CHAPTER 9.

INTERRELATIONSHIP WITH OTHER LAWS, EMPLOYER PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS

I. Overview

II. Interrelationship with Laws

A. General Principles

B. Federal Laws

1. Americans with Disabilities Act

Summarized elsewhere:
***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-cv-00092-JCN, 2017 WL 1961567 (D. Me. May 10, 2017)**

a. General Principles

Summarized elsewhere:
***Gill v. Genpact, LLC*, No. 1:17-CV-454(LMB/JFA), 2017 WL 5319938 (E.D. Va. Nov. 13, 2017)**

b. Covered Employers and Eligible Employees

Summarized elsewhere:
<u>*Coulibaly v. Tillerson*, No. 14-0712 (RC), __ F. Supp. 3d __, 2017 WL 3732096 (D.D.C. Aug. 29, 2017)</u>

c. Qualifying Events

i. Serious Health Conditions and Disabilities

ii. Triggering Events for Leave of Absence Rights

d. Nature of Leave and Restoration Rights

i. Health Benefits

ii. Restoration

iii. Light Duty

e. Medical Inquiries and Records

Summarized elsewhere:
<u>*White v. Metro. Wash. Airports Auth.*, No. 1:16-cv-670 (LMB/IDD), 2017 WL 1823183 (E.D. Va. May 5, 2017)</u>

f. Attendance Projects

2. COBRA

3. Fair Labor Standards Act

Summarized elsewhere:
<u>*Boles v. Spanish Oaks Hospice, Inc.*, No. CV416-323, 2017 WL 2222443 (S.D. Ga. May 19, 2017)</u>

<u>*Eichenholz v. Brink's Inc.*, No. 16-cv-11786-LTS, 2017 WL 1902156 (D. Mass. May 9, 2017)</u>

4. 42 U.S.C. § 1983

5. Title VII of the Civil Rights Act

<u>*Brandon v. GlaxoSmithKline, LLC*, No. 7:15-cv-01804-RDP, 2017 WL 2876184 (N.D. Ala. July 6, 2017)</u>

Employee brought several discrimination and harassment claims, including a claim under the FMLA alleging interference with her exercise of her rights. Specifically, employee alleges that she was "discouraged" from taking leave by her employer's pressure on her to: (1) disclose details about her medical treatment and medical condition, and (2) directing her to complete a third-party medical examination. Citing binding 11th Circuit precedent, the court found that employee's claims were precluded because she failed to show that she was denied any FMLA

benefit. Specifically, the court found that it was undisputed that employee received more than twelve weeks of FMLA leave and never sought reinstatement to her job. Under these facts, employee was not denied any FMLA benefit, there was no support for an interference claim and accordingly the court granted summary judgment to employer.

Summarized elsewhere:
***Wen Liu v. Univ. of Miami Sch. of Med.*, 693 F. App'x 793 (11th Cir. 2017)**

***Tognozzi v. Mastercard Int'l Inc.*, No. 4:16 CV 2045 CDP, 2017 WL 2225207 (E.D. Mo. May 22, 2017)**

***Valdivia v. Twp. High Sch. Dist. 214*, No. 16 C 10333, 2017 WL 2114965 (N.D. Ill. May 15, 2017)**

***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-cv-00092-JCN, 2017 WL 1961567 (D. Me. May 10, 2017)**

6. Uniformed Services Employment and Reemployment Rights Act

7. IRS Rules on Cafeteria Plans

8. ERISA

9. Government Contract Prevailing Wage Statutes

10. Railway Labor Act

11. NLRA and LMRA

Summarized elsewhere:
***Duane v. IXL Learning, Inc.*, No. C 17-00078 WHA, 2017 WL 2021358 (N.D. Cal. May 12, 2017)**

12. Genetic Information Nondiscrimination Act of 2008

13. Social Security Disability Insurance

C. State Laws

1. State Leave Laws

Summarized elsewhere:
***Skrynnikov v. Fed. Nat'l Mortg. Ass'n*, 226 F. Supp. 3d 26 (D.D.C. 2017)**

a. General Principles

b. Effect of Different Scope of Coverage

i. Employer Coverage

ii. Employee Eligibility

c. Measuring the Leave Period

d. Medical Certifications

e. Notice Requirements

f. Fitness-for- Duty Certification

g. Enforcement

h. Paid Family Leave Laws

2. Workers' Compensation Laws

a. General Principles

b. Job Restructuring and Light Duty

c. Requesting Medical Information

d. Recovery of Group Health Benefit Costs

3. Fair Employment Practices Laws

4. Disability Benefit Laws

5. Other State Law Claims

Summarized elsewhere:
***Davis v. Oliver St. Dermatology Mgmt., LLC*, No. 17-CV-0250-FJG, 2017 WL 3494231 (W.D. Mo. Aug. 15, 2017)**

D. City Ordinances

III. Interrelationship with Employer Practices

A. Providing Greater Benefits Than Required by the FMLA

Summarized elsewhere:
***Trautman v. Time Warner Cable TX, LLC*, No. A-16-CV-1049-LY, 2017 WL 5985573 (W.D. Tex. Dec. 1, 2017)**

***Oberthien v. CRST Logistics, Inc.*, No. 15-CV-128-LRR, 2017 WL 1128603 (N.D. Iowa Mar. 24, 2017)**

B. Employer Policy Choices

***Valenzuela v. Bill Alexander Ford Lincoln Mercury Inc.*, No. CV-15-00665-PHX-DLR, 2017 WL 1326130 (D. Ariz. Apr. 11, 2017)**

Employee worked as a car salesman for employer. He underwent eye surgery, which temporarily impaired his ability to drive, walk, and see, and he notified employer that he needed time off to recover. He returned to work, and five weeks later, employer terminated him for lack of performance; this termination coincided with the release of a sales report that showed that employee had not met minimum sales goals during the time he was recovering from his surgery. Employee brought both interference and retaliation claims against employer under the FMLA. He later conceded the FMLA retaliation claim, and employer moved for summary judgment on the FMLA interference claim.

Employer first argued that summary judgment was warranted on the ground that employee did not follow the appropriate policies and procedures for requesting FMLA leave. The court disagreed, stating that although employee did not comply with employer's policies and procedures, employer nevertheless permitted employee to take FMLA leave and treated his leave as FMLA leave. Thus, the court determined, a triable issue of fact existed as to whether employer waived its internal FMLA leave requirements. Employer next argued that the court should grant summary judgment because employee could not establish that his FMLA leave was a contributing factor in his termination because employer terminated him for poor performance over the year preceding his termination. The court dismissed this argument on the ground that employee's performance over that year was genuinely disputed and thus a jury could determine that employer's failure to adjust performance expectations to account for employee taking FMLA leave rendered such leave illusory. Accordingly, the court denied summary judgment on the FMLA claim.

1. Method for Determining the "12-Month Period"

2. Employee Notice of Need for Leave

***DeVoss v. Sw. Airlines Co.*, No. 3:16-CV-2277-D, 2017 WL 5256806 (N.D. Tex. Nov. 13, 2017)**

Employee, a flight attendant, alleged FMLA retaliation and interference against her employer, an airline. Employee filed a partial motion for summary judgment on her FMLA interference claim. Employer filed a motion for summary judgment on both FMLA claims. The district court granted employer's motion and denied employee's motion.

Employer had sent employee a notice of FMLA eligibility after she indicated she would be absent for four days. The notice directed employee to submit an FMLA application within 15 days. Employee did not do so by the prescribed deadline. The day after the deadline, employee called to report she would be late and attempted to trigger a provision under the applicable collective bargaining agreement that would prevent her from incurring attendance points. When employee learned she could not trigger the CBA provision, she stated she was calling in sick. Employee contended that this absence was related to the medical condition for which she received the FMLA eligibility notice a few weeks earlier.

The court analyzed employee's FMLA interference claim under the *McDonnell Douglas* framework. Employer maintained that employee did not provide the requisite notice of her intent to take leave and could not establish a *prima facie* case. The court agreed, holding that because employee failed to comply with employer's FMLA procedures (e.g., providing an application by the prescribed date), she could not invoke the protections of the FMLA. Employee also claimed employer was required to send her an additional eligibility notice based on her later absence. The court found the initial notice of eligibility was sufficient under the applicable regulations. It further held that United States Court of Appeals for the Fifth Circuit precedent required her to establish discriminatory intent and rejected employee's argument that employer failed to follow its policy regarding sending FMLA eligibility notices.

With respect to employee's FMLA retaliation claim, employer argued employee failed to establish she engaged in protected activity. It argued employee did not take FMLA leave and her failure to request FMLA leave was inconsistent with her allegation that employer terminated her for taking FMLA leave. Employee did not address these arguments in her briefing. Because employee failed to state any facts to establish her FMLA retaliation claim, the court dismissed the claim.

Summarized elsewhere:
***Acker v. Gen. Motors LLC*, 853 F.3d 784 (5th Cir. 2017)**

***Harris v. Chi. Transit Auth.*, No. 14 C 9106, 2017 WL 4224616 (N.D. Ill. Sept. 22, 2017)**

***Cronk v. Dolgencorp, LLC*, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)**

***Chevalier v. Metro Utils. Dist.*, 900 N.W.2d 565 (Neb. App. 2017)**

3. Substitution of Paid Leave

4. Reporting Requirements

***Mitchell v. Fed. Cartridge Co.*, No. 17-cv-610 (PAM/HB), 2017 WL 2345679 (D. Minn. May 30, 2017)**

Employee claimed employer terminated her employment in violation of the FMLA. In November 2016, employee began feeling ill and requested November 2 off from work. On November 3, employee went to the doctor and was diagnosed with strep throat. She had volunteered to work overtime shifts on November 5 and 6, but was unable to do so. Employee returned to work on November 7 but was suspended at the end of her shift for violations of company policy, specifically missing the overtime for which she had volunteered. On November 17, employee again visited the doctor, who filled out a medical statement saying employee had been unable to perform any type of work from November 3 through November 6. In her Second Amended Complaint, employee did not say she provided this statement to employer. Employer terminated employee on November 29, 2016. Employer moved to dismiss employee's complaint, alleging employee did not provide adequate notice to employer regarding her serious health condition.

Employee alleged that employer's policies required she inform her supervisor if she was ill, and that she twice called her supervisor to report that she was sick with strep throat could not work. She also alleged that she offered to provide proof to her supervisor that she sought and

received treatment for her illness. The court said whether or not the notice she gave was adequate under the FMLA is a question of fact and not appropriately resolved on a motion to dismiss. Employer's motion to dismiss was denied.

Summarized elsewhere:
***Harris v. Chi. Transit Auth.*, No. 14 C 9106, 2017 WL 4224616 (N.D. Ill. Sept. 22, 2017)**

5. Fitness-for-Duty Certification

6. Substance Abuse

7. Collecting Employee Share of Group Health Premiums

8. Other Benefits

9. Other Employment During FMLA Leave

10. Restoration to an Equivalent Position for Employees of Schools

IV. Interrelationship with Collective Bargaining Agreements

***Turner v. Ala. Gulf Coast Ry. LLC*, No. CV 15-0440-MJ-C, 2017 WL 6559916 (S.D. Ala. Dec. 22, 2017)**

Beginning April 15, 2013, employee worked for employer as a train conductor. Employee was assigned to Magnolia, Alabama as his home terminal. As a conductor, employee's job assignments and location were governed by the seniority provisions of the collective bargaining agreement between employer and its operating employees, who were represented by the United Transportation Union. In January 2014, employee was assigned to the Demopolis, Alabama terminal. In August, employee sought, and was approved for, FMLA leave, effective September 16, to care for his ailing father. In late September, employee sought, and was approved for, intermittent FMLA leave, effective September 29. Employee took intermittent FMLA leave for approximately one year. Employee contended, while he was on intermittent leave, he received between five and ten phone calls from various railroad employees. Train Master Michael Grice was alleged to have said to him, "Willie, we hired you to do a job, we didn't hire you to sit at home." Upon his return to work during and after his intermittent leave, employee was returned to the same job as a conductor and assigned the same job responsibilities at the same rate of pay. Following his FMLA leave, employee returned to the Demopolis terminal. Employee contended he wrote a letter to employer complaining Grice would not let him exercise his seniority to return to Magnolia. Employer had a requirement that after 30 or more days out of work, employees must submit to drug testing as a condition of returning to work. During his intermittent leave, employee was required to submit to drug testing. Employee filed a complaint against employer for FMLA interference and retaliation. Employer moved for summary judgment.

Regarding his interference claim, employee contended that while he was on leave, he received between five and ten phone calls from various railroad employees. The court rejected his interference claim, stating that the phone calls did not constitute FMLA interference. Employee was allowed to take all the leave he requested, was reinstated to his same position on returning from leave, and could not show that the phone calls harmed him. Regarding his

retaliation claim, employee contended that employer retaliated him against him for taking FMLA leave by precluding him from exercising his seniority rights; precluding him from obtaining overtime; and requiring him to take drug tests. The court was not persuaded that employee suffered an adverse employment action for taking FMLA leave. To the extent employee alleged his assignment to Demopolis was an adverse employment action, it was undisputed that his job assignments and locations were governed by the collective bargaining agreement, and he had been assigned to Demopolis before requesting FMLA leave. To the extent employee alleged he was unable to obtain overtime, the record showed that overtime was not available at Demopolis terminal. To the extent employee alleged he was required to take drug tests, this was in accordance with company policy. The court granted employer's motion for summary judgment.

A. General Principles

***DiCesare v. Town of Stonington*, No. 15-CV-1703 (VAB), 2017 WL 1042056 (D. Conn. Mar. 17, 2017)**

A highway supervisor for a public works department alleged retaliation in violation of the FMLA after he was terminated following FMLA leave. Prior to taking FMLA leave, employee's position became covered by a collective bargaining agreement. Employer moved to dismiss employee's FMLA retaliation claim alleging he had not exhausted the administrative remedies provided in the collective bargaining agreement's grievance procedures. The court denied employer's motion to dismiss the FMLA retaliation claim. Under Connecticut law, collective bargaining agreement procedures are the exclusive remedy, with an exception to the exhaustion requirement where no employee shall be denied the right to pursue a cause of action arising from state or federal Constitution or under state statute solely because the employee is covered by a collective bargaining agreement. The court held that this exception also applied to federal statutory claims, such as FMLA claims. Therefore, the exhaustion requirement did not prevent employee from bringing his FMLA claim.

Summarized elsewhere:
***Port Auth. Police Benevolent Ass'n, Inc. v. Port Auth. of N.Y. & N.J.*, No. 16cv3907, __ F. Supp. 3d __, 2017 WL 4838320 (S.D.N.Y. Oct. 24, 2017)**

B. Fitness-for-Duty Certification

CHAPTER 10.

INTERFERENCE, DISCRIMINATION, AND RETALIATION CLAIMS

***Vincent v. Coll. of the Mainland*, 703 F. App'x 233 (5th Cir. 2017)**

Employee Sabrina Vincent brought a FMLA retaliation claim against her former employer College of the Mainland, for which she worked as a computer lab assistant prior to her termination. She had taken leaves of absence in 2008 due to her mother's stroke and subsequent death, and in 2009 due to her husband's cancer diagnosis and subsequent death. The magistrate judge granted employer's motion for summary judgment, concluding that employee's FMLA leave requests constituted protected activity, but that she failed to show that the reasons employer gave for her termination were pretextual. Employee appealed to the Fifth Circuit.

The court agreed that the only adverse action taken against employee was her ultimate termination. A coworker following her and keeping notes about her behavior did not qualify as "materially adverse" – it would not have dissuaded a reasonable worker from making or supporting a charge of discrimination – because he was a coworker rather than a supervisor. Other coworkers' unfriendly emails were petty slights, minor annoyances, and simple lack of good manners that were not materially adverse employment actions. The court agreed that employee failed to produce any evidence, aside from her own subjective belief, that the reason given by employers for her termination – her repeated failure to follow through with corrective action plans – was a pretext. The court therefore upheld summary judgment on employee's FMLA retaliation claim.

***Tuhey v. Ill. Tool Works, Inc.*, No. 17 C 3313, 2017 WL 3278941 (N.D. Ill. Aug. 2, 2017)**

Employee John M. Tuhey brought FMLA interference and retaliation claims against employer, Illinois Tool Works, Inc., for whom he had worked as an associate general counsel for ten years before he began experiencing intermittent bouts of illness. He was hospitalized due to this illness and forced to work from home. He claimed employer interfered with his FMLA entitlement by charging time when he worked full time from home to his FMLA and short-term disability banks, then subsequently refusing to provide further protected leave. He claimed employer then retaliated against him for contesting how his time was charged by terminating him.

The court granted employer's motion to dismiss the interference claim on the ground that employee failed to allege how the alleged violation caused him any actual monetary loss. The court did so without prejudice to employee re-pleading the issue of damages. The court denied employer's motion to dismiss the retaliation claim. Employer asserted the court could not draw an inference of causation because employee complained in May 2015 that his time should not be charged to his FMLA and short-term disability banks, and was not terminated until February 15, 2016. The court rejected this argument because employee also alleged that the parties went back and forth about how the time should be charged until his termination, and that he received two unfavorable performance reviews. These additional facts supported a reasonable inference of causation at the pleading stage.

***Singleton v. Pilgrim's Pride Corp.*, No. 3:15-4999-JFA, 2017 WL 2952970 (D.S.C. July 11, 2017)**

Employee Lucy Singleton brought an FMLA retaliation claim against her former employer, employer Pilgrim's Pride Corporation. Employer moved for summary judgment; employee asserted that there was a material dispute as to whether employer's reasons for terminating her were pretextual. She claimed that temporal proximity and the different treatment of similarly situated employees demonstrated pretext. The court determined employee had failed to show that the employees she identified – comparators – were similar in all relevant respects. While they, like employee, were labeled "Questionable Fits," unlike her they were not supervisors, were not placed on a Performance Improvement Plan, and did not fail to meet performance expectations. The court concluded that temporal proximity alone was insufficient to create a genuine issue of material fact.

***Walker v. City of Pocatello*, No. 4:15-CV-00498-BLW, 2017 WL 1650014 (D. Idaho May 1, 2017)**

Employee moved for leave to amend his Complaint by adding causes of action for violations of the FMLA. The new factual allegations in his proposed Second Amended Complaint can be summed up as follows: (1) Walker took FMLA leave in September 2015 to address a medical condition with his kidneys; (2) He used his own accrued personal time off to make up for his lost wages; (3) His higher-ups ordered other officers to surveil him as part of an investigation into whether he was violating his FMLA leave; (4) The officers tracked him with a GPS-like electronic tracking device, and secretly recorded and photographed him; (5) His direct supervisor pressured him to work while on leave, and then placed a memorandum in his personnel file complaining of a large list of work items he did not complete while on FMLA leave; and (6) After returning from FMLA leave, one of the higher ups promoted a less qualified applicant instead of him because of his use of FMLA leave. Employer disputed many of employee's factual allegations, including whether his FMLA leave prevented his being promoted. Employer also contended employee's FMLA claims were futile because employer never denied him his FMLA benefits.

The court first noted that employer's disputes as to facts were not properly raised at the pleading stage. As to employer's futility argument, the court noted that an employer's consideration of employee's use of FMLA leave in making an adverse employment decision could support an interference claim. Employee's claims that he was pressured to work while on leave, complaints were made that he did not complete various work items while on leave, and, when he returned from leave, he was passed over for promotion were sufficient for employee to pursue a claim of FMLA interference. The court added that these same allegations were sufficient to support a claim of FMLA retaliation. The court granted the employee's motion to amend and reopened discovery to allow the parties to address the new claims.

Summarized elsewhere:
***Cordova v. State of N.M.*, No. 16-CV-1144-JAP-JHR, __ F. Supp. 3d __, 2017 WL 4480748 (D.N.M. Oct. 6, 2017)**

***Taulbee v. Univ. Physician Grp.*, No. 16-10807, 2017 WL 3169241 (E.D. Mich. July 26, 2017)**

I. Overview

II. Types of Claims

***Marshall v. The Rawlings Co. LLC*, 854 F.3d 368 (6th Cir. 2017)**

Employee Gloria Marshall was an employee of The Rawlings Company. Employee suffers from depression, anxiety, and PTSD. To receive treatment for her mental health problems, employee took her first leave of absence in February and March of 2012. When employee returned from leave, she had a backlog of work waiting for her from before she took her unexpected leave. In September 2012, employee was demoted. In March 2013, employee took a second FMLA leave, in addition to taking periods of FMLA leave intermittently from April through August. Employee was subsequently fired after taking time off under the FMLA for mental health problems.

Employee Gloria Marshall brought suit against former employer, The Rawlings Company. Employee brought claims for retaliation and interference under the FMLA, retaliation under the ADA, and intentional infliction of emotional distress. The district court granted employer's motion for summary judgment on all claims, and employee appealed. The court of appeals affirmed the judgment on the claims of FMLA interference and intentional infliction of emotional distress, reversed the judgment on FMLA retaliation and ADA retaliation claims, and remanded the case for further proceedings. On the first claim of FMLA retaliation, the court of appeals held that because there are genuine disputes of material fact, the district court erred by granting summary judgment in favor of The Rawlings Company. On the second claim of FMLA interference, because employee could not show that her employer denied any of her rights under the FMLA, the court of appeals held that the district court did not err in granting summary judgment for employer. On the third claim of ADA Discrimination, the court of appeals held that because there are genuine disputes of material fact, the district court erred by granting summary judgment in favor of employer. On the fourth claim of intentional infliction of emotional distress, the court of appeals held that because no incident at employee's workplace rose to the level of extreme and outrageous conduct, the district court did not err by granting summary judgment in favor of employer. Additionally, the court held that cat's paw liability can be applied to FMLA retaliation claims, and that an employee could maintain FMLA retaliation claims under cat's paw theory despite multiple layers of supervision between her and the decision maker.

***Wink v. Miller Compressing Co*., 845 F.3d 821 (7th Cir. 2017)**

Employee Tracy L. Wink had been employed in Miller Compressing Company's (Miller) order-processing department since 1999, and Miller had granted employee's request in July 2011 for intermittent FMLA leave to take her autistic son to medical appointments and therapy, as FMLA § 107 entitles eligible employees to take up to 12 work weeks of leave during any twelve-month period for qualifying reasons. In February 2012 when employee's son was expelled from day care, human resources agreed to a hybrid arrangement that would allow employee to work from home. In the summer of 2012, Miller decided that none of its employees would be allowed to work from home. On a Friday in July, Miller informed employee of this new rule. On the following Monday, employee returned to the office to inform human resources that she was unable to find care for her son, and that she would have to return home to care for him. Later that day, human resources ordered employee's termination. Employee brought suit against Miller, alleging: (1) retaliation in violation of the FMLA; (2) interference in violation of the FMLA; (3) non-payment of wages in violation of Wisconsin statute; and (4) breach of contract. The district court, after jury verdict in favor of employee denied Miller's motion for judgment as a matter of law and lowered employee's attorney fee award by 20 percent. Miller appealed the motion verdict, and employee appealed for full attorneys' fees.

Employee proved, and the jury determined, that Miller had retaliated against employee for asserting her FMLA right to take leave necessary to enable her to take care of her sick child for several hours two days a week. The jury also found that Miller had fired employee without cause or advance notice, violating the Wisconsin wage statute and breaching the employment contract. Lastly, the district judge decided to reduce the award of attorney's fees to employee by 20 percent because employee had failed to persuade the jury to find that Miller had interfered with her FMLA rights. The court of appeals, however, held that it was prudent for employee's lawyers to bring this issue because the marginal cost was slight. The court of appeals thereby affirmed the district court on all counts, including the denial of Miller's motion, but except for

the judge's 20 percent reduction in the attorneys' fees awarded to employee. The court also remanded the ruling with directions to rescind the district court's ruling and award employee her full attorneys' fees.

<u>*Diamond v. Am. Fam. Mut. Ins. Co.*, No. 4:16-00977-CV-RK, 2017 WL 5195881 (W.D. Mo. Nov. 9, 2017)</u>

Employee, an insurance claims adjuster, was terminated a few weeks after receiving a positive performance evaluation. Employee claimed he informed his supervisor about his intent to take FMLA leave during the evaluation and alleged that his termination was based on employer's concern that he would take more FMLA leave. Employee also alleged his employer retaliated against him for taking FMLA leave by giving him a heavier workload and terminating his employment. Employer filed a motion for summary judgment on employee's FMLA claims. The district court denied the motion in its entirety.

The court outlined the three types of FMLA claims recognized by United States Court of Appeals for the Eighth Circuit: entitlement, discrimination, and retaliation. The court held that a *prima facie* case for FMLA entitlement (formerly called an interference claim) requires only that employee show he was entitled to the benefit denied. The court explained that a discrimination claim occurs when an employer takes an adverse action against an employee for engaging in protected activity under the FMLA, and a retaliation claim arises when an employer takes an adverse action against an employee for opposing practices made unlawful by the FMLA. Although employee did not couch his claims in accordance with these definitions, the court analyzed employee's claims as (1) entitlement and (2) discrimination. The court determined employee established a *prima facie* case of FMLA entitlement because he was precipitously terminated after inquiring about or giving notice of FMLA leave. The court found there were material issues of disputed fact that prevented employer from prevailing on its argument that it had lawful reasons for terminating employee's employment.

The court analyzed the discrimination claim pursuant to the *McDonnell Douglas* burden-shifting framework. At the pretext inquiry, employer argued that shortcomings in its investigation of employee's alleged misconduct was insufficient to establish pretext. Employer also provided evidence of other employees who were terminated for the same reason. The court determined this was insufficient for purposes of summary judgment in light of employee's positive performance evaluation and the close timing between his protected activity and his termination.

<u>*Shimanova v. TheraCare of N.Y., Inc.*, No. 15 CIV. 6250 (LGS), 2017 WL 980342 (S.D.N.Y. Mar. 10, 2017)</u>

In early May 2013, employee informed her supervisors and human resources that she was pregnant and planned to return to work on a full-time basis after FMLA leave. In August 2013, a new director decided that two IEP Coordinator positions, of which employee was one, should be eliminated and the duties redistributed. The director met with employee and another IEP coordinator and offered them other positions. The other IEP coordinator accepted a teacher position. Employee stated in an e-mail dated August 29, 2013, that she was interested in an Assistant Director position but not a classroom teacher position. In September 2013, employee requested FMLA leave for the birth of her child.

During summary judgment, the parties disputed what the director told employee her duties would be before and after her FMLA leave. The director stated that she told employee to apply to any vacant position for placement upon her return from leave, and in the meantime, employee was assigned a temporary position doing special projects and training. Employee asserted that she was going to work as the Education Supervisor for classrooms in the Bronx until her leave and then would be promoted to a more senior position when she returned from leave. Education Supervisor was a position that the director previously offered to her. However, the job description for Education Supervisor, which employee previously helped draft, required a state certification which employee did not possess. The person ultimately hired into that position had the requisite certification. A September 24, 2013, email summarized a meeting between employee and human resources where employee was encouraged to apply for FMLA leave and review internal job postings. If employee was not interested in applying for a new position, employer would arrange a severance package for her. In October 2013, employer's in house counsel wrote employee a letter acknowledging that employee May have received "miscommunications" from employer and stating that she was eligible for FMLA leave if she applied for and accepted a vacant position. Employee did not apply for any of the 56 vacant positions posted. On December 4, 2013, employee informed her employer that her leave would begin that day. Employer reiterated that she was not eligible for leave because her position had been eliminated. Employer terminated employee's employment on December 5, 2013.

The district court granted employer summary judgment. It found that employee could not establish that she was entitled to take FMLA leave in order to sustain an interference claim because employee's position was eliminated, employee did not apply for a new position and employer terminated her employment. Employee also could not establish a retaliation claim because there was no evidence that employer restructured the department to retaliate against employee for planning to take FMLA leave. There also was no evidence that employer held a dim view of employees who take FMLA leave.

West v. CSX Transp., Inc**., No. 3:16-CV-02091, 2017 WL 77115 (M.D. Tenn. Jan. 9, 2017)**

Employee, Adam West, filed the present lawsuit alleging that employer, CSX Transportation violated the Family Medical Leave Act ("FMLA"). Employee's claim arises from the termination of his employment. Employee alleges two independent claims under the FMLA: (1) FMLA interference and (2) a declaration of the rights and obligations of the parties under the FMLA.

Employee is a former conductor for employer. Employer approved employee for intermittent leave under the FMLA for his mental health condition. On September 27, 2014, employee called his dispatch office and requested that he be placed on FMLA leave for his next work day, September 29, 2014, for a scheduled doctor's appointment. On the same day, employee had an episode related to his mental health that led to his arrest. Employee was unable to make bond from that arrest and missed his doctor's appointment. On September 30, 2016, employee's union representative submitted a request that employer allow employee a thirty day leave of absence. On October 8 2014, employer opened an investigation into whether employee misused his FMLA. On October 14, 2014, employer denied the request. The union protested employer's denial. Employer held a hearing on the disciplinary charges. Following the hearing, employer terminated employee's employment.

To establish a *prima facie* case of FMLA interference an employee must show that: (1) he was eligible employee; (2) employer was a covered employer under the FMLA; (3) he was entitled to take leave under the FMLA; (4) he notified his employer of his intent to take leave; and (5) employer denied him benefits or rights to which he was entitled under the FMLA. Here, employee does not allege that he was denied any benefits or rights to which he was entitled under the FMLA. The only benefit to which employee claims entitlement is reinstatement. The right to reinstatement only applies to an eligible employee who takes FMLA leave for the intended purpose of leave. Therefore, employee fails to state a claim for interference under the FMLA.

Summarized elsewhere:
***Garza-Delgado v. United Indep. Sch. Dist.*, No. 5:16-CV-49, 2017 WL 4326561 (S.D. Tex. Sept. 27, 2017)**

***Tuhey v. Ill. Tool Works, Inc.*, No. 17 C 3313, 2017 WL 3278941 (N.D. Ill. Aug. 2, 2017)**

***Taulbee v. Univ. Physician Grp.*, No. 16-10807, 2017 WL 3169241 (E.D. Mich. July 26, 2017)**

***Tarrant v. Hamilton Twp. Sch. Dist.*, No. 16-7058 (FLW) (LHG), 2017 WL 3023211 (D.N.J. July 14, 2017)**

***Patterson v. AJ Servs. Joint Venture I, LLP*, No. CV 115-138, 2017 WL 830394 (S.D. Ga. Mar. 2, 2017)**

A. Interference With Exercise of Rights

***Davis v. Auburn Bank*, 704 F. App'x 837 (11th Cir. 2017)**

On appeal, employee, a bank teller, argued that the district court's decision to uphold the magistrate judge's Report and Recommendation to dismiss her claims under the FMLA, and various other statutes, was in error. The circuit court affirmed the underlying decision on the FMLA claims as employee had failed to assert which FMLA rights had been violated, failed to specify a time frame for such violation, and failed to allege that employee was even qualified to receive benefits under the FMLA.

***Bush v. Compass Grp. USA, Inc.*, 683 F. App'x 440 (6th Cir. 2017)**

Employee was employed with employer as a chef manager and assigned by employer to work at Kentucky Farm Bureau's ("KFB") on-site cafe. Bush suffered from a degenerative back condition that prevented him from lifting, an essential function of his job. Employee eventually went out on an FMLA leave. Two months later, employee was released to work and subsequently terminated because he was unable to perform the essential functions of his job.

Employee filed a complaint against employer for retaliation alleging that his termination a month after returning from his FMLA leave sufficiently proved he was terminated for taking an FMLA leave. On motion for summary judgment, employer argued that it decided to terminate employee days before he requested a leave of absence because employee could no longer perform the essential functions of the job. The court granted employer's motion and employee appealed.

On appeal, the court acknowledged that in certain cases the temporarily proximity between the protected activity and the adverse employment action can give rise to an inference of retaliation. However, the relevant timeframe in determining whether employer took action against employer for exercising his rights under the FMLA is the moment that the employer learns employee engaged in protected activity not the time after the FMLA expires. Accordingly, because employer *decided* to terminate employee before he requested an FMLA leave, the appeal court held that employer had not retaliated against the employee and affirmed the district's court's dismissal of employee's retaliation claim.

***Cordova v. State of N.M.*, No. 16-CV-1144-JAP-JHR, __ F. Supp. 3d __, 2017 WL 4480748 (D.N.M. Oct. 6, 2017)**

Employee brought suit under § 2615(a) of the FMLA and 42 U.S.C. § 1983 against his former employer, the University of New Mexico Hospital (UNMH), along with employee's former supervisors, in their individual capacities. Employee was employed by employer for approximately eight years. During this time, he occasionally experienced increased symptoms due to his psychiatric conditions. However, his symptoms became more frequent and intense about a month prior to his termination. Employee submitted paperwork to employer under the FMLA to attend frequent therapy sessions and for work accommodations due to his deteriorating mental health. Employee filed suit against all defendants for FMLA interference (Count I) and FMLA retaliation (Counts II and III), among other claims. Counts I, II, and III were dismissed as to defendant UNMH because UNMH was entitled to sovereign immunity from suit based on the self-care provision of the FMLA, § 2612(a)(1)(D). Employee's retaliatory discharge claim was dismissed because the remedial scheme of the FMLA forecloses such a claim under § 1983.

The district court granted in part and denied in part, the individual defendants' motions to dismiss. As to Counts I, II, and III, the individual defendants argued that supervisory *public* employees do not fall within § 2611(a)(4)(ii)(I); therefore, the individual defendants maintained that they cannot be held individually liable as employers under the FMLA. The district court acknowledged that there is a split among the circuits on this point. The individual defendants relied on cases from the Fourth, Sixth, and Eleventh Circuits, which have drawn a distinction between the public and private sectors. However, the district court agreed with the reasoning of the majority of district courts within the Tenth Circuit and concluded that the FMLA subjects an employee of a public agency "who acts . . . in the interest of an employer to any of the employees of such employer" to individual liability for violations of the statute.

Nevertheless, the individual defendants argued that employee had not sufficiently pled their qualifications as employers and "that to be liable, individuals must have an organizational role beyond a managerial position." The district court stated that "when applying the economic reality test in the contest of individual liability under the FMLA, courts have considered the defendant's control over and involvement in the employee's ability to take FMLA leave and return to work." Employee alleged in the complaint, "that all three individually named Defendants were aware that he had asserted his rights under the FMLA, but that they interfered with those rights by denying him leave, intentionally exacerbating his symptoms, failing to return his calls, and fabricating his alleged resignation in order to terminate his employment. . . ." The district court held that the allegations were sufficient to establish that each of the individual defendants "exercised supervisory authority over Employee and took some part in the alleged violation while acting in the employer's interest."

The individual defendants further argued that Count I should be dismissed because employee had not established the deprivation of his FMLA right to be free from interference since employee did not give adequate notice to be entitled to FMLA leave. The district court was unpersuaded by this argument, as employee had described his symptoms to his supervisor, his supervisor was aware that employee requested FMLA leave, and employee's certification from his health care provider and notice of eligibility established that he was entitled to take FMLA leave for his psychiatric conditions. In addition, the district court found that the denial of employee's leave and termination of his employment when he left his workplace to seek treatment constituted allegations of adverse actions taken by the individual defendants such that they can be held individually liable. Furthermore, the district court denied the individual defendants' claim that qualified immunity shielded them from liability because "it is clearly established that the denial of qualifying leave and the termination of employment in relation to an FMLA leave request is a violation of the law."

Lastly, the district court found that employee met his burden to present a *prima facie* case of retaliation. Employee argued "that his submission of FMLA paperwork and his request and decision to leave work . . . for his FMLA qualifying condition were protected activities, and that [d]efendants acted adversely by denying his leave request, intentionally aggravating his FMLA-related medical condition, ignoring his attempts to update them as to his treatment, and separating him from his employment." The district court rejected the individual defendants' arguments that employee did not take FMLA leave, but instead left the premises of employment without permission, which the individual defendants interpreted as employee's voluntary resignation from his position. Ultimately, the district court held that "a termination of employment in response to the exercise of FMLA rights is a violation of the law" and denied the Motion as to employee's FMLA retaliation claims.

***Stewart v. Snohomish Cnty. PUD* No. 1, 262 F. Supp. 3d 1089 (W.D. Wash. 2017)**

Following a bench trial, the district court entered judgment in employer's favor in response to employee's assertion that her use of FMLA leave was a negative factor when employer disciplined and ultimately terminated her. The court found that the evidence showed that employee exhibited signs of impairment and that employer's disciplinary actions were in response to the impairment. The court noted that when employee returned to work, employer recertified the FMLA leave to include a provision requiring employee to take more time away from work when she May be impaired. According to the court, this demonstrated that employer was focused on her condition while she was at work, rather than simply making sure she was there. Consequently, the court concluded that the disciplinary actions were motivated by frustration about employee's disability and not about her use of leave.

***Chavez v. Colo. Dep't of Edu*c., 244 F. Supp. 3d 1106 (D. Colo. 2017)**

Employee brought suit under 29 U.S.C. § 2601 alleging retaliation under the FMLA for engaging in the protected activity of refusing to provide the specific medical condition the FMLA leave was related to. A district court in Colorado granted summary judgment for employer because employee failed to demonstrate that she engaged in an activity protected by the FMLA. Contrary to employee's arguments, an employee must provide information regarding a serious medical condition as a requirement to receive FMLA leave. Additionally, employee also failed to prove that employer engaged in any adverse employment activity.

***Smith v. Millennium Rail, Inc.*, 241 F. Supp. 3d 1183 (D. Kan. 2017)**

Employee was a repairman/welder for employer, who suffered from carpal tunnel syndrome. Employee sought a transfer to a job he thought he could physically perform, and employer denied him a transfer. Employee's physician opined that he could not work until he had a second surgery. Employee sought FMLA leave to have surgery. Employer's physician opined that he could return to work without restrictions. Employee took FMLA leave. Employer wrote employee a letter giving him a choice to return to work immediately or resign his position. The letter was sent on April 10 directing him to return to work on April 16. Employee received the letter on April 15. On April 16, employee did not show up for work. Subsequently, employee brought a claim for interference and retaliation. Employer moved for judgment.

First, employer argued that employee did not suffer damages because he voluntarily resigned his position. The court rejected employee's argument that he was terminated but ruled against employer, stating that a jury could find that employee was constructively discharged. Employer presented employee with a choice between returning to work in a job that he claimed he could not perform or resigning. Additionally, employer refused to allow employee to transfer to a job he thought he could perform. Given this choice and these circumstances, the resignation could be found by a jury to be involuntary.

Alternatively, employer argued that it was entitled to judgment because employee's paperwork was incomplete. It did not provide the duration of the requested leave. The court found that incomplete paperwork is not a bar to an employee's right to FMLA leave. Employer has a burden to notify employee of incomplete paperwork, and, in this case, employer did not notify him. Additionally, employer argued that it was entitled to judgment because employee could work. However, there was a disputed question of fact about whether employee could work. There were conflicting doctor's opinions, and employer did not send employee for a third opinion.

Finally, the court rejected employer's argument that there was no adverse employment action. Constructive discharge is an adverse employment action. Likewise, the court rejected employer's argument that the adverse action was not related to employee's exercise of his FMLA rights. Employer sent employee a letter to resign or return to work after he had taken leave because it believed employee was capable of working.

The court further denied summary judgment on employee's FMLA retaliation claim. A request for FMLA leave was protected activity. Employee presented a claim for constructive discharge, and employee could rely upon temporal proximity alone to show that his discharge was related to his request for leave.

***Bevan v. Cnty. of Lackawanna*, No. 3:17-CV-0919, 2017 WL 6336595 (M.D. Pa. Dec. 12, 2017)**

Employee worked as a corrections officer at the Lackawanna County Prison until he was terminated on June 3, 2015. Corrections officers at the prison are routinely mandated to work overtime. On account of a psychological impairment (severe anxiety and depression), employee requested, and was granted, intermittent FMLA leave, beginning on September 16, 2014, for any hours he was mandated to work in excess of forty hours per week and/or eight hours per day. On

October 26, 2014, employer instituted a policy mandating employee for overtime more frequently than his coworkers and in a manner that seemed to be deliberately calculated to require employee to exhaust his available medical leave. Every time employee took intermittent leave, he was returned to the bottom of the mandate list and was the very next employee to be mandated again the next time overtime was required at the prison. The net effect of employer's policy was to devour employee's leave entitlement. Employee was terminated on June 3, 2015 after he refused mandated overtime without available time for intermittent leave. Employee filed a complaint, including claims of FMLA interference and retaliation. Employer moved to dismiss employee's interference claim. The employer did not challenge employee's retaliation claim.

To make a claim of FMLA interference, an employee must establish: (1) the employee was eligible under the FMLA; (2) the employer was subject to the FMLA's requirements; (3) the employee was entitled to FMLA leave; (4) the employee gave notice to the employer of his or her intention to take FMLA leave; and (5) the employee was denied benefits to which he or she was entitled under the FMLA. Regarding the fifth prong, the court stated that employee's claim that employer interfered with his entitlement to take FMLA leave free from later discrimination confused interference with retaliation. "'An interference action is not about discrimination. It is only about whether the employer provided the employee with entitlements guaranteed by the FMLA.' *Ross v. Gilhuly*, 755 F.3d 185, 191-92 (3d Cir. 2014)." The facts showed that employer granted employee's request for FMLA leave, and he was able to use that leave. Therefore, employee had failed to state a claim for FMLA interference, and the court dismissed employee's FMLA interference claim.

***Beauvais v. City of Inkster & Booker Snow*, No. 16-CV-12814, 2017 WL 5192249 (E.D. Mich. Nov. 9, 2017)**

Employee worked as a police officer for the City of Inkster, Michigan during various periods from November 2007 until May 2017. On December 10, 2015, employee requested FMLA leave. Human Resources Director LaZonja Smith initially denied employee's request because Smith did not believe employee had worked the requisite number of hours for leave under the FMLA. On December 11, employee provided Smith with evidence that she had worked the necessary number of hours. On December 16, employee received approval of her FMLA leave. On August 1, 2016, employee filed a complaint against employer, alleging employer improperly delayed its grant of employee's request for FMLA leave. The court stated employee conceded that employer had granted her leave, so there was no genuine issue of material fact. The human resources director initially denied employee's request for FMLA leave based on a misunderstanding. Once employee clarified the misunderstanding, employer granted her leave. The court said, "'[i]nterference occurs when an employer "shortchange[s] [an employee's] leave time, den[ies] reinstatement, or otherwise interfere[s] with [an employee's] substantive FMLA rights."' *Marshall v. The Rawlings Co. LLC*, 854 F.3d 368, 384 (6th Cir. 2017) (quoting *Seeger v. Cincinnati Bell Tel. Co.*, LLC, 681 F.3d 274, 283 (6th Cir. 2012))." Stating that employer had not shortchanged employee's leave time, denied her reinstatement, or interfered with her FMLA rights, the court granted employer's motion for summary judgment on employee's FMLA claim.

***Laney v. State of La.*, No. CV 15-00848-BAJ-RLB, 2017 WL 5196394 (M.D. La. Nov. 9, 2017)**

Employer filed a motion for summary judgment against employee's claims which included an FMLA claim for injunctive relief. Since employee failed to file a memorandum in opposition to the motion, the court was free to accept as undisputed the facts that employer alleged in support of its papers. Summary judgment is appropriate if the moving party shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Based on the papers before it, the court found that employee exhausted her FMLA leave prior to her termination and that summary judgment was appropriate.

***Peterson v. WHB Transp., LLC*, No. CIV-15-878-D, 2017 WL 4106077 (W.D. Okla. Sept. 15, 2017)**

Employee was employed as a full-time driver for employer WHB Transportation. As a condition of his job, he was required to undergo routine medical examinations by the Oklahoma Department of Transportation ("ODOT"). In 2011, employee informed the ODOT medical examiner that he suffered from depression. In early July 2013, employee admitted himself to the hospital because he was experiencing "mental issues," as he called it, including road rage, depression, suicidal and homicidal thoughts. He was discharged the following day but did not return to work immediately and readmitted himself to the hospital in late July, where he remained for about 10 days. Still uncertain about his continued ability to drive, he submitted an FMLA request related to his hospitalizations and time off, which employer granted, and further requested reassignment to a warehouse position so that he could adjust to medications he was taking. However, employer considered transfers to be permanent, and this transfer resulted in lower pay for employee. Employee subsequently inquired about returning to a driving position but employer did not give him any commitment, and neither nor employer ever requested a fitness for duty medical examination. About two years later, employee resigned after securing higher-paying employment elsewhere. He then filed suit against employer, claiming that employer interfered with his right to taking FMLA leave and retaliated against him for taking such leave.

The district court granted summary judgment to employer on both counts. With respect to the interference claim, the court concluded that employee could not establish that he had been subjected to an adverse action, given that he voluntarily requested, and was granted, permission to transfer to a different position upon his return from FMLA leave. The FMLA does not require an employer to rescind such a voluntary transfer. Moreover, employee could not establish any evidence that employer's refusal to reinstate him to a driving position was related to his request for FMLA leave. As to the retaliation claim, the court determined that there was no evidence of pretext in employer's not reinstating him to a driving position, given that he voluntarily requested the transfer and that only he raised the issue of his mental condition, citing it as the basis for his request. Moreover, a minimal delay in employer's processing his FMLA paperwork, which had no impact on his actual taking of leave, was not evidence of retaliation. Finally, given that employee continued to work for employer for two more years, along with his admission that he would have continued to work for employer if he had not obtained his new job, belied his contention that he was constructively discharged.

***Tarpley v. City Colls. of Chi.*, No. 14 C 6712, 2017 WL 3600571 (N.D. Ill. Aug. 22, 2017)**

Employee worked as Director of Information Technology for employer, City Colleges of Chicago. Due to the demanding nature of her job, employee was occasionally required to work on days which she had called in sick or planned to take vacation. While employee was employed with employer, she suffered from several health conditions and was periodically undergoing *in vitro* fertilization. After an unsuccessful IVF procedure, she was absent from work for varying periods during her employment. Employee took FMLA leave on several occasions, both on an intermittent and a continuous basis. Employer had previously been calculating FMLA leave on a calendar year basis, under which an employee's bank of FMLA days would entirely reset on a given date. However while employee was on leave, employer announced a district-wide change to its FMLA policy, under which FMLA leave would be calculated on a rolling 12-month basis. Additionally, while employee was on leave, one of employer's new employees had moved into employee's office on a temporary basis. Employee made multiple requests to employer's employees while on leave asking to be forwarded work-related correspondence so she could get up to speed before returning to work. She was told on more than one occasion by employer that she should not be performing work related tasks while on leave. Employee ultimately resigned and subsequently alleged both FMLA interference and FMLA retaliation claims.

The United States District Court of the Northern District of Illinois found for employer on both claims reasoning that employee took all of the FMLA leave that she requested and to which she was entitled and employer approved every FMLA request she made. Therefore, employee could not satisfy the requirement that her employer denied her FMLA benefits to which she was entitled. Additionally, employee did not prove any evidence of an adverse employment action taken against her as a result of taking FMLA leave. So, her FMLA retaliation claim also failed.

***Goodman v. City of Kingston, Tenn.*, No. 3:16-cv-00097, 2017 WL 3161667 (E.D. Tenn. July 25, 2017)**

Employee Goodman was a long-term employe who filed suit alleging his emloyer violated his rights under the FMLA and wrongfully terminated him. Employer moved for summary judgment claiming that it was never on notice of a serious health condition, that employee never requested FMLA leave, and that employee was terminated for job abandonment. The motion was denied. The district court found that employer was aware employee had a spinal injury, and employer had received a doctor's note describing the nature of employee's illness and stating that employee could return to work when testing was concluded. Those facts were sufficient to put employer on notice (even though employee never mentioned FMLA by name). Taking the facts in a light favorable to employee, a jury could reasonbly find that employer failed to inform employee of his rights under the FMLA. Such a finding could support claims of both interference with the FMLA and retaliation under the FMLA.

***O'Connor v. Nationwide Children's Hosp.*, No. 2:16-cv-357, 2017 WL 3085687 (S.D. Ohio July 20, 2017)**

Employee, a hospital technician whose shoulder was crushed at work when a freight elevator door shut on her, was placed on FMLA leave by her employer because of her inability to work. After her FMLA leave expired, employee did not request further FMLA leave and did not return to work, prompting employer to terminate her employment. Employee sued employer for

wrongful termination and interference under the FMLA, claiming that she was involuntarily placed on FMLA leave by employer so that employer could manipulate Ohio's workers compensation rules. The district court granted employer's motion for summary judgment, finding that employee failed to submit any evidence that she was able to work and should not have been placed on FMLA leave. The court noted that an FMLA interference claim for involuntary leave ripens when an employer forces an employee to take FMLA leave when the employee does not have a serious health condition that precludes her from working. Employee did not deny that she was unable to work, but only that her leave should have been granted under workers' compensation law and not the FMLA, which is not a claim that is protected by the FMLA.

***Cimino v. Magee-Womens Hosp. of UPMC*, No. 15-1145, 2017 WL 2780586 (W.D. Pa. June 27, 2017)**

Employee brought suit under the FMLA, claiming both interference and retaliation. Employer brought a motion for summary judgment on both counts. The court denied employer's motion as to interference, but granted the motion as to retaliation.

First, employer's motion for summary judgment as to employee's claim for interference under the FMLA was denied. The court said, "[t]he Department of Labor's regulation is clear on this point – discouraging an employee from using leave constitutes interference, even if the request for leave is granted. *See* 29 C.F.R. § 825.220(b)." Employee alleges that she was instructed to schedule her father's doctor's appointments at the beginning and end of the day, and that her employer's body language denoted disapproval of employee's use of her FMLA leave. The court held that reasonable jurors could find employer's conduct as constituting interference, and that this genuine dispute as to material fact should preclude summary judgment.

Second, as to employee's retaliation claim, the court held that employee failed to demonstrate a causal connection between her request for FMLA leave and her termination because her termination was initiated before any FMLA request. As the court held in *Atchison v. Sears*, 666 F. Supp. 2d 477 (E.D. Pa. 2009), employee cannot base an FMLA retaliation claim on a request for leave sought after the decision to terminate is made. In this case, employee's position was included among a list of positions to be eliminated more than a month prior to employee's request for leave was submitted. In addition, although employee had inquired as to other available positions and was told there were none, available positions were not publicly disclosed until after the Unit Director position (employee's position) was eliminated. The purpose of this was to avoid "tumult" within the unit, rather than to preclude employee from employment. Therefore, based on these facts, the court upheld employer's motion for summary judgment with respect to the retaliation claim.

***Groening v. Glen Lake Cmty. Schs.*, No. 1:15-CV-1068, 2017 WL 2772362 (W.D. Mich. June 27, 2017)**

Employee was employed by a school district as its Superintendent from 2006 until she resigned from her position in August of 2015. Employee brought claims under the FMLA for interference and retaliation. After briefing and oral arguments, the court sitting in the Western District of Michigan granted summary judgment to the employer on both claims.

In analyzing employee's interference claim, the court noted the only element of the cause of action at issue was whether employer denied employee FMLA benefits or interfered with her protected rights under the statute. The court concluded that employee was never denied any FMLA leave and that no member of the school board objected to her taking FMLA leave and refuted each of employee's interference theories. Employee attempted to argue: (1) the school board communicated with and questioned her on an almost daily basis while she was on FMLA leave; (2) board members openly expressed their frustration that employee was taking FMLA leave; and (3) employer, by way of its board members, requested employee to provide clarification as to what type of leave she was taking and voted to conduct an audit of the school district's financial records. The court found the record did not demonstrate any constant communications and requests with employee that were not initiated by employee herself or more than merely *de minimis* contact. The court further stated the frustration board members expressed was because employee was away from the district for many other reasons, including two weeks of vacation within weeks of her FMLA leave. Finally, the court rejected the argument that the audit was interference as it was perfectly legitimate and did not adversely affect employee's pay, responsibilities, or other aspects of her employment.

With regard to the retaliation claim, the court held employee could not establish a *prima facie* case of retaliation because she failed to demonstrate that employer took an adverse action against her. Specifically, employee failed to show that she was constructively discharged. The court was unconvinced by employee's argument that the audit completed by the school district's attorney somehow made her working conditions so intolerable that a reasonable person would be forced to resign. The court noted that employee failed to rebut employer's claim that the audit was merely conducted because of separate concerns that employee had not submitted complete or accurate information about the management of the school district, which was supported by evidence of inconsistencies and falsities communicated by employee to others in her department. That the audit included, in part, inquiries regarding employee's leave was of no consequence. Thus, the court concluded that both FMLA interference and retaliation claims failed as a matter of law.

**Note: this case was appealed to the Sixth Circuit on July 25, 2017. The parties have submitted their briefing.*

<u>*Floyd v. Cnty. of Maricopa*, No. 16-15450, 2017 WL 2480738 (9th Cir. June 8, 2017)</u>

Employee sued employer for interference with her exercise of rights under the FMLA. Specifically, employee alleged that employer demoted her as a result of her use of FMLA leave. Employee appealed the decision of the United States District Court for the District of Arizona which granted summary judgment to employer on the FLMA claim. On appeal, the Ninth Circuit issued an unpublished opinion whereby it held that employee did not tender sufficient evidence to create a genuine issue of material fact with regard to the causation element of her FMLA claim. The court found the only evidence submitted by employee going to causation were stray remarks made by her supervisor reflecting she was unhappy with employee taking FMLA leave. The court held that stray remarks, without more, cannot demonstrate the requisite causal link between employee's availment of FMLA leave and her subsequent demotion. Moreover, the court noted relevant evidence from employer demonstrating that it demoted employee for a number of reasons which employee herself conceded. The court found that the foregoing clearly demonstrated that employer was entitled to judgment as a matter of law.

<u>*Greenman v. Metro Prop. & Cas. Ins. Co.*, No. 15-004-ML, 2017 WL 2438776 (D.R.I. June 6, 2017)</u>

Employee brought a lawsuit under the Rhode Island Civil Rights Act for discrimination on the basis of her gender and pregnancy and the FMLA for retaliation and interference. In a lengthy opinion dedicated mostly to analyzing employee's discrimination claims, the United States District Court for the District of Rhode Island granted employer's summary judgment motion on all claims.

Employer faced mandatory budget cuts and made the decision to terminate employee's position due to the fact that employee was the most inexperienced in her department. Employee argued that the decision to terminate her position was instead motivated by the fact that she was pregnant and would be soon going on medical leave. The court noted, however, that employer decided to keep employee employed to allow her to use her benefits and go on pregnancy leave. It was not until after employee had received all of her fully paid maternity leave and nearly completed her FMLA that employer terminated employee. The court was persuaded by employer's decision to retain employee after making the economic decision that her position needed to be ended. The court noted that employee herself conceded the fact that she was the most inexperienced person in her department and that her position was ended for that reason. The court also noted evidence which showed that employee's actual termination was spurred not by employee's exercise of FMLA leave, but rather by the fact that employee would have qualified for a significant severance package had she remained employed. As a result, the court found there lacked any genuine issue as to a material fact and entered judgment in favor of employer.

<u>*Bonini v. Fla. Dep't of Corrs.*, No. 8:17-cv-164-T-23TGW, 2017 WL 2427263 (M.D. Fla. June 5, 2017)</u>

Employee brought claims alleging retaliation for exercising his FMLA rights. Employee's son suffered from spina bifida and other conditions that required "continuous supervision." Accordingly, employee had used intermittent FMLA leave for most of his fifteen year tenure as a correctional officer. When new supervisors arrived, they allegedly began disciplining employee for unscheduled absences that were unforeseeable but necessary due to his son's condition. Employer filed a motion to dismiss asserting a number of technical deficiencies in employee's complaint. The court held that employee's complaint contained sufficient facts to state a claim for retaliation.

Specifically, employee alleged a number of retaliatory acts including being reprimanded for not wearing his uniform, manipulating work schedules on short notice, and falsely accusing employee of abusing sick time and terminating his employment. After employee's firing, a sergeant allegedly told employee that his supervisor had been "out to get" employee for invoking the FMLA. Employer identified several pleading defects in its motion to dismiss, including failing to identify the name of the person responsible for employee's firing and a failure to identify a causal connection between his protected activity and the firing. The court, however, found that employees allegations – including that his supervisor had been "out to get" him -- permitted an inference that the supervisors terminated him in retaliation for exercising his FMLA rights. Accordingly, the court held the complaint contained sufficient facts to state a claim of retaliation.

***Craig v. Charles Town Gen. Hosp.*, No. 3:16-CV-36 (GROH), 2017 WL 2260697 (N.D. W.Va. May 23, 2017)**

Employee, an employee at a hospital, sued in the Northern District of West Virginia for interference with his rights under the FMLA. The district court granted summary judgment for employer. Employee underwent a cholecystectomy and she requested, and employer granted, approximately seven weeks of FMLA leave. Employee, however, returned to work one month earlier than anticipated –employer requested, and employee complied by submitting, a doctor's letter releasing her back to full duty. About 10 days after her return, employee was unable to work due to pain in the upper right quadrant in the location of her recent surgery. Employee, however, did not inform Human Resources why she would not be able to work that day, did not advise how long she would be out and did not request that the absence count as FMLA leave.

Employer terminated employee because of attendance – she had 7 non-FMLA unexcused absences and employer counted as unexcused the absence when she could not work due to pain in her upper right quadrant. The court stated that the record undisputably revealed that employee did not provide adequate notice of her intention to take FMLA leave for her absence due to pain in her upper right quadrant. Employee did not give a reason for the absence or indicate that the absence was related to the cholecystectomy. She also did not indicate the anticipated timing and duration of the leave. Thus, employer was never placed on notice that employee May be in need of FMLA leave.

Employee also argued that employer violated 29 C.F.R. § 825.300(d)(5) because it failed to provide her with a designation notice within five business days after it learned that she was returning to work early. The court held that such notice was not required because employee did not request an extension to her leave, employee failed to provide adequate notice that she required an additional FMLA leave, and there was no indication that employee was close to exhausting the entire 12 weeks of leave available under FMLA.

***Taylor v. J.C. Penney Co., Inc.*, No. 16-cv-11797, 2017 WL 1908786 (E.D. Mich. May 10, 2017)**

Employee, a former department store employee of employer J.C. Penney Company, Inc., brought suit before a district court in Michigan based on two theories of liability for FMLA interference due to employer interfering with employee's FMLA leave and misclassifying Personal Time Off (PTO) as Illness Recovery Time (IRT).

The court granted employer's motion to dismiss portions of employee's amended complaint on the first theory of liability that employee failed to sufficiently allege facts demonstrating she was entitled to intermittent FMLA leave in November 2015. Employee failed to plead facts sufficient to show she notified employer of her intention to take FMLA leave in Nonmember 2015. Based thereon, employee's contention that her FMLA rights were interfered with because she "may" have claimed further intermittent FMLA leave is speculative and fails to state a plausible claim for relief.

With respect employee's second theory of liability, the court dismissed employee's contention the paid leave for the November 2 absence should have been designated as IRT, as opposed to PTO, because it did not state a plausible claim for interference under the FMLA. For FMLA interference claims, the issue is whether employer provided its employee the entitlements

set forth in the FMLA. The FMLA does not entitle an employee to a particular designation of paid leave offered under an employer's policy. Further, a claim for FMLA interference does not lie with a dispute over whether an absence is credited as PTO or IRT is not covered under FMLA because an employee is not entitled under the FMLA to either receive IRT for absent days or have absences characterized as IRT, as opposed to PTO.

White v. Metro. Wash. Airports Auth., No. 1:16-cv-670 (LMB/IDD), 2017 WL 1823183 (E.D. Va. May 5, 2017)

Employee, a former police officer diagnosed with diabetes and a *pro se* litigant, brought claims before a district court in Virginia against employer Metropolitan Washington Airports Authority for interference with his FMLA rights, FMLA retaliation and discrimination, and various ADA and Title VII of the Civil Rights Act of 1964 claims. He sought back pay, front pay in lieu of reinstatement, and liquidated damages. Employer moved for summary judgment as to all counts. To prevail on a claim for FMLA interference, an employee must demonstrate he is entitled to FMLA benefit, his employer interfered with the provision of that benefit, and that interference caused harm. Here, the court found employee was not prejudiced by employer's failure to provide clear notice in the designation letter regarding the fitness-for-duty certification as he had been sufficiently informed of an annual requirement to pass said certification.

In like manner, employee did not prevail on his claim for FMLA retaliation and discrimination. The court held there was no evidence in the record to support an inference employee was fired because he took FMLA leave nor that any of employer's employees made a single negative comment about his leave. Simply put, employee was fired for failing to follow orders to provide the appropriate doctor reports and his Absent Without Leave status after his FMLA leave had expired.

Mayo v. St Mary's Med. Ctr., Inc., No. 16-0245, 2017 WL 1348514 (W. Va. Apr. 7, 2017)

Employee brought suit against former employer under the Family and Medical Leave Act for inference with his FMLA rights and retaliating against him for exercising his FMLA rights by terminating employee after hospitalization for depression. Employer moved for summary judgment arguing that employee did not give notice as to why he was hospitalized and that the discharge from employment was unrelated to employee's depression. The circuit court entered summary judgment for employer, and employee appealed.

The Supreme Court of Appeals held that: (1) employee did not establish FMLA interference claim, absent showing of prejudice, and (2) employee did not establish a retaliatory discharge claim under the FMLA. The court reasoned that there was no showing of prejudice since employee was terminated as a direct result of his harassment of a fellow employee and his continued violation of employer's Standards of Behavior. The court further found that employee proffered no evidence to establish that his termination was a result of his hospitalization or his alleged FMLA claim.

Johnson v. Camden City Sch. Dist., No. 1:15-CV-01124-NLH-JS, 2017 WL 1227925 (D.N.J. Apr. 3, 2017)

Employee, the head custodian at Camden City School District ("district") filed suit against the district claiming that employer violated her FMLA rights in two ways. First, employee contends that employer interfered with her FMLA rights under 29 U.S.C. § 2615(a) by

terminating her, therefore preventing her from using her FMLA leave. Second, employee claims that her termination was a pretext and the true motivation for her termination was for her use of the FMLA leave. Employer moved for summary judgment on both employee's interference and retaliation claims. The district court in New Jersey denied the summary judgment motion filed by the school district on the ground that disputed issues of material fact exist related to credibility determinations.

The court noted that employee's interference claim May stand, even though 29 U.S.C. § 2615(a) concerns only whether an employer has prevented its employee from availing herself of her FMLA leave and not whether an employee has suffered an adverse employment action as a result of using her FMLA leave. Employee's termination precluded her from using more than only a few weeks of her afforded six-month leave. Employee's allegation that employer's hostility to the use of her FMLA leave led to her termination, if true, is the ultimate "interference" with employee's FMLA rights. Whether this interference was related to employee's use of her FMLA leave is for a jury to decide. With regards to employee's retaliation claim, the court noted that employee established her *prima facie* case due to the temporal proximity of employee's termination and employee's use of the FMLA leave. Employee's argument, that employer's hostility over her use of the FMLA leave time caused employer to seize an opportunity to set into motion the events that resulted in employee's termination for insubordination, is sufficient to satisfy employee's *prima facie* case for her retaliation claim.

***Howard v. Balon Corp.*, No. CIV-15-737-D, 2017 WL 1215758 (W.D. Okla. Mar. 31, 2017)**

Employee, a machine operator, brought suit against her former employer, a family-owned corporation employing more than 900 employees. Employer had a written attendance policy that required all employees to call a dedicated telephone line to report work absences or lateness for work. During her employment, employee received verbal and written warnings for attendance and productivity issues. Employee annually accrued 120 hours of paid vacation, which could be used for any reason designated by the employer. As of July 2014, employee had exhausted all 120 hours of paid vacation she had accrued and would not accrue anymore until her anniversary date in May 2015. In February 2015, employee incurred numerous absences from work. In March 2015, employee requested a pay increase. On March 23, 2015, employer decided to terminate employee's employment. The following day, a form was prepared to terminate employee's employment. That same day, employee called in sick and was absent from work. This continued for four work days. Employee returned to work six calendar days later. When she returned to work, she was informed of the termination decision. Employee claimed that her termination constituted interference and retaliation in violation of the FMLA.

Employer moved for summary judgment on employee's interference and retaliation claims. The district court in Oklahoma granted summary judgment as to both FMLA claims because it was undisputed that the decision to terminate employee's employment was made before her four-day period of medical absence. The district court further found that employee's argument that it was unbelievable that employer would decide to terminate employee's employment as a result of her request for a pay increase was unavailing because it was not its role to ask whether employer's decision was wise, fair or correct, but rather to ask whether employer's decision was motivated by discriminatory animus.

***Lebowitz v. N.Y. City Dep't of Educ.*, No. 15-CV-2890 (LDH) (ST), 2017 WL 1232472 (E.D.N.Y. Mar. 31, 2017)**

Employee, a former teacher, brought suit against the Department of Education and individual defendants under the Family and Medical Leave Act for retaliating against him for exercising FMLA rights. Employee alleged that he was fired for taking FMLA leave and that he was treated differently than other employees who did not take FMLA leave. Employer filed a motion to dismiss, which the court granted.

The court found that employee did not plausibly allege a claim of retaliation under the FMLA because he failed to establish a causal connection between his FMLA leave and any purported adverse action taken against him. The court postured that employee proffered no direct proof of retaliation and that employer's discipline resulted from repeated absences and not employee's leave. The court further found that employee failed to establish a causal connection between his leave and the adverse action where five months had elapsed and he received a positive evaluation prior to a negative evaluation upon his return to work. The court relied upon Second Circuit precedent for the holding that a positive evaluation disrupts the causal connection between FMLA leave and a purported adverse action. Further, the court found that the Complaint contained no facts that indicated that any other teachers took FMLA leave, and as such, employee could not establish a causal connection by demonstrating that he was treated differently than other teachers engaging in the same protected activity.

***Moore v. Verizon Wireless (VAW), LLC*, No. 5:14-CV-02230-SGC, 2017 WL 1196959 (N.D. Ala. Mar. 31, 2017)**

Employee sued employer on interference and retaliation violations of the FMLA. Employee commenced work for employer in 2007 as a supervisor in the customer service department. During her employment, employee applied for and was granted various leaves of absence under the FMLA for various health conditions. Upon her return from an FMLA leave in September 2011, employee was provided with an accommodation allowing her to sit down rather than walk the floor while supervising her subordinates. On September 8, 2011, employee received a written warning regarding her handling of several customer calls in a manner employer deemed inappropriate. In February 2012, employee took approved FMLA leave for a broken wrist. While on leave, employee called in and spoke every week with her associate director. She and the associate director discussed work matters. On one occasion, employee called into an office meeting and was asked to drop off the call because she was on leave. After her leave ended, employee applied for and was granted an accommodation in the form of a "Dragon" voice automated system so she would not have to type on a keyboard. On January 11, 2013, employee took a call from a customer, where she argued with him and his wife and appeared to hang up on him. Employee filed for FMLA leave on January 22, 2013. Employee was formally terminated on January 25, 2013.

Employer filed a motion for summary judgment. The court granted employer's request to time-bar any FMLA claims based on conduct predating 11/18/12 (employee's complaint was filed 11/18/14). The court noted that employee's claims pertaining to her January 25, 2013 termination were not time-barred, as they occurred within two years of the date complaint was filed.

In her retaliation claim, employee established the first two elements of a *prima facie* case by showing she had requested an accommodation for her disability and FMLA leave on January 15, 2013, and was terminated shortly thereafter. However, there was clear evidence that employer was well on its way to terminating her prior to her taking leave, so employer's motion for summary judgment on the retaliation claim was granted.

In her interference claim, employee contended she was denied the exercise of her right to take the leave for which she had been approved prior to her termination. The court stated, "'the right to commence FMLA leave is not absolute, and [ ] an employee can be dismissed, preventing her from exercising her right to commence FMLA leave, without thereby violating the FMLA, if the employee would have been dismissed regardless of any request for FMLA leave.'" (*Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1236 (11th Cir. 2010)). Employer's motion for summary judgment on employee's interference claim was granted.

***Maiorini v. Farmers Ins. Exch.*, No. CV 14-1613, 2017 WL 1177172 (E.D. Pa. Mar. 30, 2017)**

Employee, a former claims representative at an insurance company, brought suit against former employer under the Family and Medical Leave Act for retaliating against her for exercising FMLA rights. Employer continually disciplined employee for one year prior to her request for leave. Additionally, employee did not notify employer of a need for surgery or request an accommodation prior to her request for leave. Employer filed for summary judgment. The court entered summary judgment for employer.

The court, relying on Third Circuit precedent, found that employee failed to establish a causal connection between her request for leave and her termination where eight months had passed. Also relying on Third Circuit precedent, the Court noted that: (1) an employee cannot easily establish a causal connection between protected activity and alleged retaliation where employee has received significant negative evaluations before engaging in a protected activity; and (2) terminating an employee for falsifying his or her need for leave is not retaliation, nor can the request for such termination be evidence of retaliatory animus.

***D'Antonio v. Petro, Inc.*, No. 14-2697, 2017 WL 1184163 (E.D.N.Y. Mar. 29, 2017)**

Employee brought suit under 29 U.S.C. § 2601 alleging retaliation based on employee's protected activity of general office complaints. A district court in New York granted summary judgment because generalized complaints are insufficient to constitute protected activity under the FMLA. Employee failed to provide evidence of employer complaining about disability or discrimination. Employer's complaints were not based upon FMLA leave but of the out of control state of the office. The case is pending before the Second Circuit.

***McKenzie v. Seneca Foods Corp.*, No. 16-CV-49-JDP, 2017 WL 1155966 (W.D. Wis. Mar. 27, 2017)**

Employee brought suit against her former employer under the Family and Medical Leave Act for inference with her FMLA rights and retaliating against her for requesting FMLA leave. Employee alleged that employer interfered with her FMLA rights by firing her for taking time off as authorized under the FMLA, and interfered with her FMLA rights by firing her for taking time off as authorized under the FMLA. Employer moved for summary judgment on the grounds that it lawfully terminated employee according to its attendance and FMLA policies.

The court granted summary judgment for the FMLA interference claim, but denied summary judgment for the FMLA retaliation claim.

The court held, in line with Seventh Circuit precedent, regarding the interference claim that: (1) employers do not interfere with their employees' FMLA rights when they require compliance with their internal policies even if their policies impose stricter notice requirements than the FMLA itself; (2) an employer can deny FMLA leave to an employee who did not follow employer's internal procedural requirements for requesting FMLA leave; and (3) the details of a company's internal leave procedures is a subject for a labor arbitrator when it comes to the analysis of an FMLA interference claim. Additionally, also in line with Seventh Circuit precedent, the court held regarding the retaliation claim that evidence of suspicious timing and ambiguous statements, among other things, is sufficient to withstand summary judgment.

***Calaman v. Carlisle HMA, LLC*, No., 1:16-CV-116, 2017 WL 1105127 (M.D. Pa. Mar. 24, 2017)**

Employee was employed as a nurse. On July 3, 2014, employee went out on an FMLA leave. During her leave, employer contacted employee inquiring whether she could return to work to alleviate her co-workers' workload. Employee declined the offer. Employee ultimately exhausted her time under the FMLA leave and remained off under employer's personal time off policy. While employee was on unprotected time off, employer hired employee's replacement. Employee was later released to work and terminated as her position had been filled.

Employee sued employer for FMLA retaliation and interference. Specifically, employee alleged employer interfered with her FMLA when it contacted her to return to work. Employee also alleged she was terminated for exercising her FMLA rights. Employer filed a motion for summary judgment. The court concluded that employer had a legitimate business need to replace employee's position because two full-time nurses were needed to service patients. The court also held that employee had been terminated only after she had exhausted her FMLA and dismissed employee's retaliation claims.

The court next addressed the FMLA interference claim. The court noted that refusing to authorize leave, manipulating positions to avoid application of the Act or discriminatorily applying policies to discourage employees from taking leave can form the basis for an interference claim. However, the court refused to uphold employee's FMLA interference claim holding that employer's act of contacting employee during her leave to ask if she could return to work did not actually interfere with employee's FMLA leave.

***Banner v. Wesley*, No. CV 14-691-LPS, 2017 WL 1033526 (D. Del. Mar. 17, 2017)**

Employee sued defendants for retaliation and interference under the FMLA. Specifically, employee alleges her application for an internal position was rejected because her former supervisor, Robert Doyle ("Doyle"), was unaware that her prior absences were protected under the FMLA, thereby, disqualifying her as a candidate. Employee also alleges that her current supervisor, Genelle Fletcher ("Fletcher") adversely commented on her performance plan in retaliation for having taken a leave of absence, interfered with employee's FMLA leave when employer asked her to submit medical information above that required by the FMLA, and denied her the right to recertify her leave, in violation of her FMLA rights.

Employer filed a motion to dismiss employee's retaliation and interference claims. The court dismissed employee's retaliation claim against Doyle holding that because Doyle had no knowledge employee had taken an FMLA leave when he rejected her application, employee had not alleged facts sufficient to demonstrate a causal connection between taking time off under the FMLA and the denial of her application. The court also dismissed employee's retaliation and interference claims against Fletcher holding that employee had failed to allege sufficient facts showing Fletcher had taken adverse actions against employee because employee exercised her rights under the FMLA or that Fletcher interfered with employee's FMLA leave.

Summarized elsewhere:
***Shultz v. Congregation Shearith Israel*, 867 F.3d 298 (2d Cir. 2017)**

***Hill v. Branch Banking & Tr. Co.*, 264 F. Supp. 3d 1247 (N.D. Ala. 2017)**

***McIntosh v. White Horse Vill., Inc.*, 249 F. Supp. 3d 796 (E.D. Pa. 2017)**

***DeVoss v. Sw. Airlines Co.*, No. 3:16-CV-2277-D, 2017 WL 5256806 (N.D. Tex. Nov. 13, 2017)**

***Gill v. Genpact, LLC*, No. 1:17-CV-454(LMB/JFA), 2017 WL 5319938 (E.D. Va. Nov. 13, 2017)**

***Foruria v. Centerline Drivers, LLC*, No. 116CV00328EJLREB, 2017 WL 5492196 (D. Idaho Nov. 6, 2017)**

***Noisette v. Holy City Hosp.*, No. 2:16-2829-RMG, 2017 WL 3314227 (D.S.C. Aug. 3, 2017)**

***Tuhey v. Ill. Tool Works, Inc.*, No. 17 C 3313, 2017 WL 3278941 (N.D. Ill. Aug. 2, 2017)**

***Taulbee v. Univ. Physician Grp.*, No. 16-10807, 2017 WL 3169241 (E.D. Mich. July 26, 2017)**

***Tarrant v. Hamilton Twp. Sch. Dist.*, No. 16-7058 (FLW) (LHG), 2017 WL 3023211 (D.N.J. July 14, 2017)**

***Cannon v. Univ. of Tenn.*, No. 3:15-CV-576, 2017 WL 2189565 (E.D. Tenn. May 17, 2017)**

***Cleveland v. Jefferson Cnty. Bd. of Educ.*, No. 2:15-cv-01538-JEO, 2017 WL 1806826 (N.D. Ala. May 5, 2017)**

***Wilson v. Dynasplint Sys., Inc.*, No. 3:14-CV-310, 2017 WL 1208848 (S.D. Ohio Apr. 3, 2017)**

***Yolich v. Fin. Mgmt. Sys. Inc.*, No. 16 C 4007, 2017 WL 1199744 (N.D. Ill. Mar. 30, 2017)**

***Chipman v. Cook,* No. 3:15-CV-143 KGB, 2017 WL 1160585 (E.D. Ark. Mar. 28, 2017)**

***Blackett v. Whole Foods Mkt. Grp., Inc.*, No. 3:14-CV-01896 (JAM), 2017 WL 1138126 (D. Conn. Mar. 27, 2017)**

***Gardner v. Summit Cnty. Educ. Serv. Ctr.*, No. 5:15CV1270, 2017 WL 979120 (N.D. Ohio Mar. 14, 2017)**

***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

***Hall-Dingle v. Geodis Wilson USA, Inc.*, No. CV 15-1868 (SRC), 2017 WL 899906 (D.N.J. Mar. 7, 2017)**

***West v. CSX Transp., Inc.*, No. 3:16-CV-02091, 2017 WL 77115 (M.D. Tenn. Jan. 9, 2017)**

1. *Prima Facie* Case

***King v. Ford Motor Co.*, 872 F.3d 833 (7th Cir. 2017)**

Employee worked for employer for over twenty years as an assembler in two different plants. In 2013, employee developed a medical condition that required her to take time off from work. She requested a medical leave of absence and was granted conditional leave. She submitted documentation from her medical provider, but employer deemed it to be insufficient. Employee failed to submit any additional documentation despite requests from employer. Employer terminated employee's employment five days later. At the time of her termination, employer's records showed that she had only worked 970 hours in the previous 12 months, and thus was not entitled to leave under the FMLA.

Employee subsequently filed suit, asserting claims under the FLSA, Title VII, and the FMLA. Employer moved for summary judgment as to employee's interference and retaliation claims. The district court granted employer's motion. On appeal, the circuit court affirmed the district court, finding that employer could not have interfered with employee's rights under the FMLA because she was not eligible for leave at the time of her termination. The court rejected employee's attempt to claim that she worked additional hours not recorded by employer because employee failed to substantiate those claims. The circuit court also found that employee had failed to state a claim of retaliation under the FMLA because employee had failed to show that a causal nexus existed between her protected activity and her termination, which occurred nine months later. In addition, employee failed to point to any evidence that her termination was pretext for retaliation.

***Mullendore v. City of Belding*, 872 F.3d 322 (6th Cir. 2017)**

Employee served as the City Manager for Employer City of Belding, Michigan. Employee notified the City that she would be having surgery and would have to work remotely to facilitate her recovery. While she was away from the office, the City voted to terminate her employment. Employee then filed an FMLA interference claim against the City of Belding and individual members of the City Council. A Michigan District Court granted employer's motion for summary judgment from the bench. The court determined that the City was not put on notice of employee's intent to take medical leave, and even if it was, there was insufficient evidence to conclude that its decision was made because of employee's attempt to exercise her leave.

The Sixth Circuit Court of Appeals agreed and held that under the FMLA theory of interference, employee had the burden of demonstrating that the City terminated her because she was on FMLA leave. That an adverse employment action occurred while she was on leave, without more, does not suffice to demonstrate that the action was based, in whole or in part, on the fact that employee took FMLA-protected leave. The evidence merely demonstrated that the

members of City Council terminated her when she was absent because it was personally or politically expedient to do so.

***Elliot-Leach v. N.Y.C. Dep't of Educ.*, No. 16-3098-cv, __ F. App'x __, 2017 WL 4071121 (2d Cir. Sept. 14, 2017)**

Former teacher sued city's Department of Education for FMLA interference and retaliation. The district court dismissed both claims, and the Second Circuit Court of Appeals affirmed. While employee claimed that employer interfered with her FMLA rights because it knew of her cancer diagnosis and failed to grant her full FMLA leave, the court found that the complaint did not sufficiently allege that employee was eligible for full FMLA leave when she requested it. The fact that she was diagnosed with cancer was not sufficient to establish that she was entitled to full FMLA leave. Furthermore, employee's doctor had declined to certify that she was entitled to full FMLA leave. Regarding the retaliation claim, employee relied solely on the temporal proximity between her request for leave and her termination. The court, however, concluded that because employee had been disciplined for work absences before she requested leave, temporal proximity, alone, could not establish the requisite causal connection. Therefore, the court held that the district court properly found that employee failed to state a retaliation claim.

***Padilla v. Yeshiva Univ.*, 691 F. App'x 53 (2d Cir. 2017)**

This opinion is a Summary Order of the Second Circuit, vacating the ruling on a Federal Rule of Civil Procedure 12(b)(6) motion issued by the Southern District of New York. Employee alleged retaliation under the FMLA. The Second Circuit ruled "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," employee need only allege enough facts to "raise a right to relief above the speculative level" and "state a claim for relief that is plausible on its face." The court held that, at the pleading stage, the allegation of inconsistent explanations for the termination of employees, together with other allegations, including the timing and sequence of events and purported hostility with respect to prior exercise of FMLA rights, are enough to support an inference of retaliation.

***Levaine v. Tower Auto. Operations USA I, LLC*, 680 F. App'x 390 (6th Cir. 2017)**

The court of appeals affirmed the grant of summary judgment in this case. Employee, a former employee of Tower Automotive, arrived late for work by minutes and wrote "FMLA" on his timecard. He was written up for his tardiness and became visibly upset. When he left the disciplinary meeting concerning the event two days later, he threatened one of his supervisors in a shouting incident. The employee was suspended for the shouting incident, and ultimately fired.

The court determined that FMLA leave was never approved, and that the employer was in the process of attempting to obtain more information about FMLA applicability in the meeting. As a result, the interference claim failed. The court also dismissed the retaliation claim on the basis that the employer had a non-retaliatory reason for firing the employee, stating that temporal proximity alone was not sufficient to prove causation.

***Strahan v. Bowen Ctr.*, 240 F. Supp. 3d 926 (N.D. Ind. 2017)**

Employee was terminated on June 24, 2014, for "ongoing issues with respect to communication and attendance." Employee's extensive disciplinary record spanned most of the

five years that she was employed. In August 2012, employee requested and was granted leave to care for her sister. In August 2013, employee requested intermittent FMLA leave for the care of her father. Employer claimed that they never received a completed certification. In February 2014, employer again provided employee with the FMLA paperwork and claimed that it again never received the completed paperwork.

On summary judgment, in addition to arguing that it did not receive the proper paperwork, employer argued that it never denied employee's FMLA requested. In response to employer's motion for summary judgment, employee claimed that she submitted the completed medical certification prior to her termination. However, she admitted that she received all of the leave that she requested, and employer never denied her requests for leave. Furthermore, employee did not claim that any of her absences for which she was fired were FMLA related. The district court granted employer summary judgment because employee failed to identify that defendants interfered with her rights.

***Schwartz v. Nicomatic, Inc.*, No. CV 17-2516, 2017 WL 6606888 (E.D. Pa. Dec. 27, 2017)**

Employee began working for employer in April 2014 as an accounting clerk through a temporary placement agency. In June 2014, her job became permanent. She was transitioned into a traditional HR role, despite the fact that she had no previous experience with human resources. She was to work in tandem with ADP TotalSource, an outside consultant who provided HR services to employer. In February 2016, employee spent two days in the hospital, due to issues with her blood pressure. Her doctor then placed her on a week of bedrest. When she returned to work, she asked Maureen Bradley (an employee at ADP TotalSource) for information about the FMLA. Employee had applications for both leave under the FMLA and under employer's medical leave plan, when the company had less than 50 employees, "printed out on [her] desk." However, despite her role as an HR person, employee was not sure which plan was applicable. Bradley never sent her the information. Employee did not need additional medical leave and never applied for leave. Shortly thereafter, following an investigation conducted by ADP TotalSource, employee was terminated.

Employee filed a complaint against employer for FMLA interference and retaliation. Employer filed a motion for summary judgment. The court stated that employee failed to adduce a *prima facie* case in support of her FMLA claims. She never invoked her right to take FMLA leave. She did not request leave, so she was not entitled to leave. She was not entitled to leave, so employer did not interfere with her FMLA rights. Employer's motion for summary judgment was granted.

***Sanchez v. City of Pembroke Pines, Fla.*, No. 16-CV-62958, 2017 WL 5068370 (S.D. Fla. Nov. 3, 2017)**

Employee was a firefighter and paramedic for the City of Pembroke Pines, Florida, from July 2008 to December 2014. During his employment, he took an intermittent leave of absence under the FMLA. He eventually resigned from his employment in order to relocate outside of South Florida. After a medical condition arose with his son, employee decided to stay in South Florida. On two occasions thereafter, employee contacted employer about being rehired. However, he was not brought back by employer.

Employee brought a number of claims against employer in the United States District Court for the Southern District of Florida, alleging a number of FMLA claims including a failure to hire. On cross-motions for summary judgment, the court dismissed employee's failure-to-hire claim. In doing so, it noted that employee had only made two inquiries over five months about rehiring. He had never actually applied for rehire nor took any affirmative steps to be rehired. The court concluded that it had "serious doubts" that, without more, employee would be able to prove he suffered an adverse employment action under a failure-to-hire theory.

***Bertig v. Ribaudo HealthCare Grp., LLC*, No. 3:15CV2224, 2017 WL 4922012 (M.D. Pa. Oct. 31, 2017)**

Employee, a nurses' aide at employer's nursing home, brought suit against employer for interference and retaliation under the FMLA. The Middle District Court of Pennsylvania granted summary judgment for employer on both counts, holding that because at least ten out of twelve of employee's absences that employer cited in her termination were unrelated to her FMLA-qualifying disabilities, she was not entitled to FMLA leave for those absences. The court also highlighted that employer did not have notice of employee's disability, given that, despite the fact that employee had taken FMLA leave before and was aware of the requirements and that employer warned employee about her excessive absences, employee did not take any steps in applying for FMLA leave for the time period in question. Therefore, for the purposes of interference, she was not entitled to FMLA leave for those absences. Likewise, for the purposes of employee's retaliation claim, because the reasons for employee's absences in question were unrelated to her FMLA-qualifying illnesses, she was not engaged in protected activity under the FMLA and therefore could not establish her *prima facie* case.

***West v. Pella Corp.*, No. 5:16-CV-154-TBR, 2017 WL 4765653 (W.D. Ky. Oct. 20, 2017)**

Employee worked at employer's manufacturing plant from 2004 until his termination in 2015. In June 2014, employee injured his back at work, and he began calling in sick, informing his employer that he could not work due to back pain. He visited his physician, who diagnosed him with chronic lumbago and muscle spasms and prescribed multiple medications, and employee continued to miss work. Employee never applied for FMLA leave during this absence because he did not know about it. In July 2014, employee's manager told him to go back to the doctor, who again prescribed him multiple medications. When employee returned to work at the end of August, his employer provided him with disciplinary letters relating to his absence. Then in February 2015, employee called in sick multiple days, and employer terminated him. Employee brought both FMLA interference and FMLA retaliation claims against employer, and employer moved for summary judgment.

With respect to the interference claim, the court applied the *McDonnell Douglas* burden-shifting framework to determine that a genuine dispute of fact precluded summary judgment. The court first determined that employee established a *prima facie* case. At issue were three elements: whether employee had a serious health condition, whether employee provided adequate notice, and whether employer denied employee benefits or rights under the FMLA. The court found that employee had established a serious health condition because he had visited his doctor twice in the summer of 2014 and his doctor had diagnosed his back spasms as a chronic condition. The court also determined that there was a disputed issue of material fact as to whether employee had provided adequate notice of his need for leave due to an FMLA-qualifying condition because employee had informed his manager that he pulled his back out at

work, he called his supervisor many times to inform him he could not make it to work due to back pain, and his supervisor told him to go to the doctor about his back pain. And finally, the court found that because a genuine dispute existed as to the notice element, the issue of whether employer interfered with that leave was also in dispute. The court then moved to the second prong of the *McDonnell Douglas* framework and determined that on summary judgment, employer had not offered a legitimate, nondiscriminatory reason because its reason – excessive absenteeism – was intertwined with employee's FMLA-qualifying condition. The court further held that for the same reasons the interference claim survived summary judgment, genuine dispute of fact precluded summary judgment on the retaliation claim.

***Moore v. Computer Sciences Corp.*, No. 5:15-cv-00683-MHH, 2017 WL 3873777 (N.D. Ala. Sept. 5, 2017)**

Employee brought suit alleging that employer interfered with her ability to take FMLA leave, among other claims. The district court denied employer's motion for summary judgment. Employee, a senior billing accountant for employer, had been diagnosed with breast cancer in 2010 and taken FMLA leave for six months. In 2013, employee's cancer returned. Employee initiated the process to request FMLA leave, but did not complete the FMLA request paperwork. Employee alleged that she decided to delay her medical leave because she believed employees were "forbidden to take leave" during the end of the year when there was a push to get all of the bills out, based upon comments made by a person in management. Employee was subsequently laid off during a reduction in force that occurred in 2014.

The company argued on summary judgment that employee's FMLA claim could not proceed because the company did not deny her FMLA leave, as employee had not made the request. The district court rejected the argument, however, explaining that FMLA interference occurs not only where leave is denied, but also where a company discourages an employee from using her leave. The court concluded that employee had presented sufficient evidence that a jury could find that the company had discouraged its employees from requesting leave during the end of the year push. The district court also rejected employer's contention that employee had not established any prejudice, finding that employee had raised a triable issue of fact as to whether her termination was a result of FMLA interference. Therefore, the court denied the motion for summary judgment on the FMLA claim.

***Sefovic v. Mem'l Sloan Kettering Cancer Ctr.*, No. 15 Civ. 5792 (PAC), 2017 WL 3668845 (S.D.N.Y. Aug. 23, 2017)**

In granting employer's motion for summary judgment on an interference with the exercise of FMLA rights, the court found that there was no FMLA violation when employee failed to establish a *prima facie* case of FMLA retaliation and had fully exhausted leave.

A former operations manager sued a cancer treatment center and his former supervisors for retaliation and interference with his rights under the FMLA. Employee alleged employers denied him FMLA leave and eventually terminated him when he was unable to return to work following a long period of leave and after suffering a subsequent, unrelated back injury. The district court granted employers' motion for summary judgment on the grounds that employee could not establish that he was qualified for his position and because employee failed to show that he was in fact denied FMLA leave. During deposition, employee admitted that he was unable to return to work. Employee further admitted that there was nothing employers could

have done to allow him to perform his job. Accordingly, the court held that employee could not establish a *prima facie* case of FMLA retaliation. The court further found that, because employee took FMLA leave from February 10, 2014 through April 1, 2014, and from May 13, 2014 through June 12, 2014, employee had in fact taken all of the FMLA leave to which he was entitled.

***Fagan v. Elwyn Inc.*, No. 17-393, 2017 WL 3456528 (E.D. Pa. Aug. 11, 2017)**

Employee filed FMLA interference claim against former employer after he was terminated following return from FMLA leave. Employee alleged that employer was aware that he applied or intended to apply to take intermittent FMLA leave after his return to work. A district court in Pennsylvania rejected employer's argument that employee was not denied benefits to which he was entitled because he had taken and completed FMLA leave. Instead, the court concluded that employee sufficiently alleged that he applied or intended to apply for intermittent leave, which would have entitled him to FMLA benefits in the future. Therefore, the court concluded that employee's termination could allow for recovery under an interference theory and denied employer's motion to dismiss.

***Brunson v. Montgomery Cnty.*, No. 3:16-cv-00368, 2017 WL 3301574 (S.D. Ohio Aug. 3, 2017)**

Employee originally sued Montgomery County, Ohio *pro se* and *in forma pauperis* for discrimination and retaliation. Eight months later, after employee had secured counsel, employee filed a Motion for Leave to File an Amended Complaint. The proposed amended complaint added additional claims, including an FMLA claim. Employer opposed this motion and argued that the proposed amended complaint failed to set forth facts showing that employee suffered from a serious health condition entitling him to FMLA leave or that employee had FMLA leave available to him.

A district court in Ohio rejected employer's argument and held that employee's proposed amended complaint stated a plausible FMLA interference claim. In order to state an FMLA interference claim, an employee must allege facts showing h/she was eligible for FMLA leave, defendant was an employer as defined under the FMLA, employee was entitled to take leave under the FMLA, employee gave employer notice of his/her intention to take leave, and employer denied employee FMLA benefits to which h/she was entitled. Employee alleged that his physician submitted the required FMLA paperwork and that employer told employee it had successfully processed the paperwork. In addition, employee alleged that after his paperwork was successfully processed, employer informed employee that he was in violation of employer's attendance policy. When employee attempted to correct the problem and submit corrected forms, employer denied employee his entitled FMLA leave by refusing to accept the corrected forms. The Court reasoned that assuming these events had occurred, employer essentially acknowledged that employee was an eligible employee entitled to take FMLA leave, and by submitting FMLA paperwork, employee gave employer notice of his intention to take FMLA leave. Furthermore, employee was entitled to FMLA leave once he submitted his initial paperwork, and later employer denied him the FMLA leave he was entitled to. Therefore, the Court granted employee's Motion for Leave to File Amended Complaint, adding employee's FMLA claim.

***Dallefeld v. The Clubs at River City, Inc.*, No. 1:15-cv-01244-JES-JEH, 2017 WL 3013241 (C.D. Ill. July 14, 2017)**

Employee worked as a salesperson for employer. His medical care provider sent two letters, the first dated March 26 and the second June 4, to employer stating that employee could not work. Two days before the second letter, employee's supervisor advised him to get knee surgery. On June 13, employer mailed employee a letter terminating him. At no time did employer ever offer employee the opportunity to take FMLA leave. Employee sued employer for interference and retaliation under the FMLA. Employee sought relief in the form of back pay, prejudgment interest, liquidated damages and front pay. The court granted employer's motion for judgment on employee's claim for retaliation, but a jury returned a verdict in favor of employee on his interference theory.

In calculating the amount of back pay owed, the court ruled that June 4 was the time in which employee's 12-week FMLA allotment began running, making September 4 the day when his FMLA leave expired. This was important because employee could have returned to work on August 13, but on modified duty, and was thus was willing and able to resume his job duties before his 12-week entitlement ran out. His termination therefore constituted interference with his rights under the FMLA. The court, however, reduced employee's prayer of $147,414.46 for backpay to $12,846.84. It did so by limiting the period of his recovery to 12 weeks and multiplying that by employee's $128.22 daily backpay figure. The court also awarded employee $1,430.62 in prejudgment interest over a period of 3.2 years, which was the time between June 4 and the jury's verdict. The amount was determined by multiplying the average prime rate (3.48%) by the backpay award by 3.2 years. Employee was not entitled to liquidated damages or front pay. As to the former, employer demonstrated sufficient good faith to disqualify employee from that relief. This was because employee was made aware of his FMLA rights upon hiring, his supervisor encouraged him to obtain knee surgery, that the supervisor was a decent person, employer paid for some of the leave employee took despite learning that employee was in Florida during that time, and the general good working relationship between the two. Front pay was not appropriate because employee failed to demonstrate that he could return to work after his FMLA leave ended on September 4. While his medical care provider authorized him to resume working, that was on a modified basis. Because the FMLA does not recognize light duty under the FMLA, an employer can terminate an employee if he or she does cannot perform the duties of his or her job when their FMLA leave ends. The court also denied recover for cell phone costs, vacation pay, gym membership, and option dental insurance.

***Waugh v. Int'l SOS Assistance, Inc.*, No. 4:15-CV-1815, 2017 WL 2646146 (S.D. Tex. June 20, 2017)**

A regional security manager who was terminated after seeking treatment for a brain injury alleged that his termination violated his rights under the FMLA. Dismissing the claim, the court succinctly found that there was no evidence that employee was eligible for benefits under the FMLA given that (1) his leave did not exceed that needed for a doctor's visit, (2) employee did not seek leave that was not granted, (3) that he was treated differently than employees who took leave for occasional doctor's visits, and (4) that employee notified employer that he "specifically intended to take FMLA leave."

***Ennin v. CNH Indus. Am., LLC*, No. 1:15-cv-01359-RLY-MPB, 2017 WL 2225203 (S.D. Ind. May 22, 2017)**

Employee brought suit against CNH Industrial America, LLC where he was a former supervisor. He alleged claims for interference and retaliation in violation of the FMLA, among other claims. Employee had requested medical leave pursuant to the FMLA on two separate occasions. In both instances, his leave had been approved. He was terminated shortly after his second request for leave was approved because he had asked an employee to leave the premises to help him with a personal matter and he had violated building security rules.

Employer filed a motion for summary judgment as to all claims. As to the interference claim, the court held that employee was required to show, among other things, that employer had denied him FMLA benefits to which he was entitled. Since employee had, in fact, been approved for medical leave both times that he requested it, the court held that this requirement was not met. As to the retaliation claim, the court held that employee failed to produce any evidence that employer had fired him because he took leave. His second leave of request had already been approved before he was terminated. Furthermore, employer had proffered legitimate reasons for terminating him (i.e., his violation of company and security policies). Therefore, the court granted employer's motion for summary judgment as to the FMLA claims.

***Williams v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, No. 3:16-CV-00098-NBB-JMV, 2017 WL 1957971 (N.D. Miss. May 10, 2017)**

Employee brought suit against Greenwood Leflore Hospital alleging that employer wrongfully interfered with her FMLA rights by not providing her with FMLA leave. She further alleged that she was terminated in retaliation for her request for FMLA leave. Employee had suffered from a back injury and was told by her doctor that she should not return to work until she had met with a neurologist. Employer informed her she was qualified for FMLA leave so she completed and submitted the appropriate paperwork. The day after meeting with her neurologist and submitting the FMLA paperwork, she was terminated. Employer's reason for firing her was that she had allowed an unauthorized person to inject a patient. Employer moved for summary judgment. The court, however, denied the motion for summary judgment as to the FMLA claims finding that there were genuine issues of material fact whether the week she took off before seeing her neurologist constituted FMLA leave, whether employer had terminated her because of her back problems and/or because she sought medical attention, and whether employer terminated her for requesting and/or taking FMLA leave.

***Foye v. SEPTA*, No. CV 15-1036, 2017 WL 1150259 (E.D. Pa. Mar. 28, 2017)**

Employee brought suit against employer for FMLA interference and retaliation after employer terminated his employment for violation of the "last chance agreement." The employee argued that employer interfered and retaliated against him for invoking his FMLA rights when it did not accept his untimely FMLA paperwork as it had previously done for him and other employees. Employer moved for summary judgment arguing that employee failed to demonstrate he was entitled to FMLA benefits because he requested FMLA leave one week after the unexcused absence, which ultimately resulted in the termination of his employment.

The court granted employer's motion for summary judgment on the FMLA retaliation and interference claim. The court rejected employee's arguments and noted that although

employer's FMLA policy mirrored FMLA requirements, the FMLA does not require employers to disregard internal policies in order to facilitate an employee's request. Rather, it commands employers to follow their FMLA policies. Further, the court held that while a jury could reasonably conclude that employee invoked his FMLA rights, employee failed to point to any specific evidence of causation between the invocation of his FMLA rights and the termination of his employment. Therefore, he could not establish a *prima facie* case and summary judgment was appropriate.

***Nance v. Ira E. Clark Detective Agency, Inc.*, No. 3:15-cv-00073-RLY-MPB, 2017 WL 590249 (S.D. Ind. Feb. 14, 2017)**

Employee, a former manager at employer's detective agency, claimed that employer interfered with his right to take FMLA leave. Employer moved for summary judgment, which the United States District Court for the Southern District of Indiana granted.

Employee injured his back while working from home and then injured it again about a month later while at a client site. Employee joked about his injury, never missed a day of work and did not notify anyone at the company that he was seeing a doctor because of the injury. About two months after the second injury, employee prepared a memo to his supervisor and never indicated that he was unable to work due to his injury. Thus, employee failed to satisfy the fourth element of an interference claim, that employee provided the company with sufficient notice regarding his serious health condition. The court noted that an employer does not have a duty to investigate whether an employee has a serious health condition. Rather, employee must communicate the basis and not just demand leave.

***Meles v. Avalon Health Care, LLC*, No. 3:16-545, 2017 WL 551921 (M.D. Tenn. Feb. 10, 2017)**

The court granted employer's motion for summary judgment against an employee claiming violations of FMLA for termination related to her unexplained absence. Employee failed to respond to the summary judgment motion, but admitted that she was verbally terminated before she requested FMLA leave. Employer's motion was granted because employee could not establish a claim for retaliation or interference.

***Shackleford v. D&W Fine Pack, LLC*, No. 1:15-CV-282-TLS, 2017 WL 371627 (N.D. Ind. Jan. 25, 2017)**

On February 22, 2014, an employee suffered an on-the-job injury to his shoulder and filed a workers' compensation claim. Employer accommodated his light duty restrictions. Employee had surgery and subsequently reinjured his shoulder. On September 4, 2014, employee began a 90 day transitional return to work program within his physical restrictions. At the end of October, he had reached maximum medical improvement and had permanent work restrictions.

On November 24, 2014, employee sought a second opinion. The doctor reported that his shoulder could be surgically repaired with the goal of returning employee to full regular duties. Employee informed his employer that he would like to have surgery and return to work without restrictions. He was told to follow up with the workers' compensation claims adjuster. On December 15, 2014, employee met with employer's human resources generalist to inquire about his employment, treatment recommendation and FMLA leave. The human resources generalist

did not know the status of employee's continued employment or treatment. The next day, employee was terminated because he had reached maximum medical improvement, the work program had expired and employer could no longer accommodate his permanent restrictions. After his termination, he received approval from the workers' compensation insurance company to pursue continued treatment. On February 11, 2015, he had a second surgery, and on April 30, 2015, he was released with no work restrictions.

Employee claimed that employer fired him in retaliation for filing a workers' compensation claim and interfered with his FMLA rights. The district court granted employer's motion for summary judgment on employee's FMLA claim, rejecting employee's theory of harm. Employee argued that if he had been granted FMLA leave, he could have returned to work without restrictions within 12 weeks of taking leave. However, the undisputed facts were that employee's release to work date was more than 12 weeks after his FMLA leave would have started. Therefore, even if employer granted him 12 weeks leave, employee would not have been able to return to work without restrictions at the end of his leave. The workers' compensation retaliation case was remanded to state court.

***Hilbert v. Ohio Dep't of Transp.*, 84 N.E. 3d 301 (Ohio App. 2017)**

Employee brought suit alleging interference with his right to medically related leave under the FMLA and retaliation for exercising his rights under the FMLA. Employee and employer filed cross-motions for summary judgment. The court of claims denied employee's motion and granted employer's motion. Employee appealed.

The court of appeal held that when employer received what it believed to be insufficient medical certification, it was required to (1) advise employee that his certification was insufficient, (2) state in writing what additional information was necessary to make it sufficient and (3) provide him with an opportunity to cure before denying his request for leave. Here, the court held that a *prima facie* claim of interference with his rights under the FMLA was established as employer terminated employee before he received the designation notice.

Furthermore, the court stated the *McDonnell Douglas* framework but held that to survive summary judgment, employee need only produce enough evidence to support a *prima facie* case and to rebut, not to disprove employer's alleged reasons. Here, the court of appeal found that there was a genuine issue of material fact which precluded making a finding in favor of employer.

Regarding the retaliation claim, the court of appeal held that a proximity in time between the protected activity and the adverse employment action May constitute evidence of a causal connection. Here, the court found that the fact that employer fired employee less than one month after he applied for FMLA leave is sufficient to establish a causal connection between the exercise of his FMLA rights and his termination. Therefore, the court of appeal reversed the judgment of the court of claims and remanded the case to that court for further appropriate proceedings.

Summarized elsewhere:
***Capps v. Mondelez Global, LLC*, 847 F.3d 144 (3d Cir. 2017)**

***Holton v. First Coast Serv. Options, Inc.*, 703 Fed.Appx. 917 (11th Cir. 2017)**

***Walker v. JP Morgan Chase Bank*, 262 F. Supp. 3d 574 (N.D. Ill. 2017)**

***Wevodau v. Commonwealth of Pa.*, 227 F. Supp. 3d 404 (M.D. Pa. 2017)**

***Diamond v. Am. Fam. Mut. Ins. Co.*, No. 4:16-00977-CV-RK, 2017 WL 5195881 (W.D. Mo. Nov. 9, 2017)**

***White v. Smiths Med. ASD, Inc.*, No. 3:15-cv-01501-VLB, 2017 WL 4868556 (D. Conn. Oct. 27, 2017)**

***Sanders v. Temenos USA Inc.*, No. 16-cv-63040-BLOOM/Valle, 2017 WL 4577235 (S.D. Fla. Oct. 13, 2017)**

***Boulware v. S.C. Dep't of Health & Human Servs.*, No. 3:17-01110-MGL, 2017 WL 4401673 (D.S.C. Oct. 4, 2017)**

***Hall v. Dougherty Cnty. Sch. Sys.*, No. 1:15-CV-189 (LJA), 2017 WL 3584908 (M.D. Ga. Aug. 17, 2017)**

***McKay v. Med. Univ. of S.C.*, No. 2:17-45-RMG, 2017 WL 3477799 (D.S.C. Aug. 14, 2017)**

***McCallum v. Grays Harbor Cnty.*, No. 3:16-cv-05609-RJB, 2017 WL 3387347 (W.D. Wash. Aug. 7, 2017)**

***Tuhey v. Ill. Tool Works, Inc.*, No. 17 C 3313, 2017 WL 3278941 (N.D. Ill. Aug. 2, 2017)**

***Taulbee v. Univ. Physician Grp.*, No. 16-10807, 2017 WL 3169241 (E.D. Mich. July 26, 2017)**

***O'Connor v. Nationwide Children's Hosp.*, No. 2:16-cv-357, 2017 WL 3085687 (S.D. Ohio July 20, 2017)**

***Trahanas v. Nw. Univ.*, No. 15-CV-11192, 2017 WL 2880879 (N.D. Ill. July 6, 2017)**

***Cronk v. Dolgencorp, LLC*, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)**

***Powers v. Covestro LLC*, No. 2:16-cv-05253, 2017 WL 1952230 (S.D. W.Va. May 10, 2017)**

***Corbin v. Med. Ctr., Navicent Health*, No. 5:15-CV-153 (CAR), 2017 WL 1241430 (M.D. Ga. Mar. 31, 2017)**

***West v. CSX Transp., Inc.*, No. 3:16-CV-02091, 2017 WL 77115 (M.D. Tenn. Jan. 9, 2017)**

2. Interference Claims

***Gjokaj v. U.S. Steel Corp.*, 700 F. App'x 494 (6th Cir. 2017)**

Employee crushed the tip of his finger with a steel-rolling machine while working for employer. After his injury, employer sought to provide him with medical treatment, but he was uncooperative. He showed up late to multiple follow-up evaluations; he lied to medical personnel about having his finger amputated. Employer disciplined and later terminated him, for failing to follow medical directive and for misrepresenting his medical condition. Employee

sued under the FMLA, the ADA, and state law, but the United States District Court for the Eastern District of Michigan granted summary judgment to employer.

Noting that employee's FMLA claim was merely a "reformulation of his [workers' compensation] claim," the Sixth Circuit rejected employee's claim that employer interfered with his rights under the FMLA by prohibiting him from seeing his own doctor and preventing him from calling in sick after he injured his finger. Specifically, the court explained that employee was not prevented from seeing his own doctor, nor did employer refuse to allow him to call in sick. In fact, employer offered to assist him with getting to medical assistance, and employee agreed to see employer's physician.

***Johnson v. Fifth Third Bank*, 685 F. App'x 379 (6th Cir. 2017)**

Employee, a personal banker at Fifth Third Bank filed suit claiming that employer had violated her FMLA rights by interfering with her exercise or attempt to exercise her rights to take qualifying medical leave and/or retaliated against her in violation of the FMLA. Employer filed a motion for summary judgment and the district court in Michigan granted employer's motion. Johnson filed an appeal and the Sixth Circuit Court of Appeals affirmed the district court's ruling.

Employee claimed that she was terminated after informing her supervisor that she would be taking FMLA leave. The court rejected employee's arguments that employer's reason for terminating her was pretext. Employee argues that the timing of her termination is evidence of pretext because she was fired only two weeks after telling employer about her upcoming surgery. The court found that given that the facts show a three-year cycle of poor performance on the part of employee, employee counseling, and multiple second chances, with no indication that employee would ever improve, temporal proximity, without more, is not sufficient to find pretext.

Employee also argued that employer used performance reviews as pretext to fire her. First, she points to the fact that employer did not provide her with FMLA paperwork, but the court found that the facts show that employee was only giving employer a "heads up" and was not formally requesting leave, she did not know when her surgery would take place or how long she would have to be out of work to recover when she spoke to her supervisor. Second, employee argues that employer's inconsistent testimony is evidence of pretext, but the court noted that employer has consistently argued that employee was terminated because of her history of poor sales performance. Third, employee argues that the fact that another employee was given the opportunity to resign after making an error, while not affording her the same opportunity, demonstrates that employer's reason for terminating her was pretextual. However, the court noted that employee's circumstances were different, given that she had a history of poor performance, unlike the other employee who only had one incident of misconduct. Therefore, the court found that employer had ample evidence of a legitimate, nondiscriminatory reason for her termination, and employee was unable to show, by a preponderance of the evidence, that employer's reason was pretextual.

***Eppinger v. Caterpillar Inc.*, 682 F. App'x 479 (7th Cir. 2017)**

After recurring unexcused absences, employer terminated employee for attendance policy violations. Employee sued her former employer and two of its managers, alleging she was

terminated because of her race and because she filed administrative charges of discrimination with the EEOC and the equivalent state agency. Employee also claimed she was terminated because she took FMLA leave. The district court granted summary judgment in favor of employer because employee failed to put forth any evidence that her firing was motivated by racial *animus*. Further, because employee could not establish that she was denied FMLA leave for any day she had requested, she could not establish that defendants interfered with her FMLA benefits.

The court of appeal affirmed the judgment, concluding that the lower court properly found that there was no evidence from which a jury could find a causal connection between the filing of her administrative complaints, and her discharge five months later. Further, employee offered no evidence of differential treatment of employees with comparable attendance issues. Accordingly, the court could not draw an inference of retaliation or termination for taking protected FMLA leave.

***Storrs v. Univ. of Cincinnati*, No. 1:15-CV-136, __ F. Supp. 3d __, 2017 WL 4270516 (S.D. Ohio Sept. 26, 2017)**

Tenure-track assistant professor hired in 2009 was consistently praised for the quality of her teaching but also regularly alerted that her research and publication were unlikely to lead to tenure. In 2011 she took 12 weeks of FMLA leave to care for her spouse with cancer. In addition, her employer gave her the remainder of the academic year off. Employee was denied tenure in 2013 due to her lack of quality research and publications. Employee filed suit alleging, *inter alia*, that she was denied FMLA benefits and suffered retaliation for taking FMLA leave.

The district court granted summary judgment to employer on employee's FMLA claims. First, the court found that employee was not denied FMLA benefits when she decided to meet during her FMLA leave with students whom she had been advising prior to her leave where the was no evidence the university required to do so. Similarly, the court found employer had not placed any expectation that employee would conduct research or work on publications, even though a colleague suggested that employee might be able to do so. The court granted summary judgment on employee's retaliation claim finding no evidence that the university considered her failure to conduct research or publish during her FMLA leave negatively in its adverse tenure decision.

***Richardson v. D.C. Dep't of Youth Rehab. Servs.*, No. 1:15-cv-0458 (TSC), __ F. Supp. 3d __, 2017 WL 4236527 (D.D.C. Sept. 22, 2017)**

Following her discharge as part of a reduction in force in approximately September 2013, employee filed suit against her employer claiming, among many other things, that she was denied FMLA leave to take care of her mother, in violation of the FMLA. On motion for summary judgment by employer, the court noted that employee's FMLA claim was "difficult to untangle," given that she first alleged that employer discriminated against her after she complained about a delay in processing her FMLA leave "requests" yet failed to describe the nature of the alleged discrimination. Employee further claimed that employer approved leave requests in February and April 2012, and employer stated that it failed to receive an alleged leave request submitted in August 2012. Employee claimed, without elaboration, that delays in approving these requests "severely impacted the medical care" she was able to provide for her mother. The court concluded that, at the summary judgment stage, these conclusory allegations

were insufficient to overcome dismissal of her claim, given her admission in discovery that employer never prevented her from taking FMLA leave.

***Pecora v. ADP, LLC*, 232 F. Supp. 3d 1213 (M.D. Fla. 2017)**

Employee brought suit in the district court through which he alleged that employer retaliated against him for taking leave under the FMLA and interfered with his rights under the FMLA, among other claims. The matter was before the court on employer's motion for summary judgment. Employee was a sales employee of employer. Employee did not meet his sales goals and had reprimands regarding such. Employee alleged that he told supervisors variously that he was undergoing anxiety due to troubles at home and drinking quite a bit. Employee was evaluated based on monthly sales goals. After employee returned from leave, he was placed on a performance improvement plan that switched his sales goals from monthly to weekly. Employee resigned after being given the plan. Employee relies on the temporal proximity of his being given the performance improvement plan with unattainable goals and his exercise of rights to show a *prima facie* case of retaliation. The court found that the decision to issue the plan was made before employee requested leave and, therefore, no causal connection can exist. Employers May continue with adverse actions in motion before the exercise of FMLA rights. The court also noted that if the unattainable performance goals are issued because of the FMLA leave, then a case of retaliation could be established. The court found no such evidence in this case and concluded that employee failed to establish a *prima facie* case of retaliation.

Despite finding that no *prima facie* case existed, the court continued with the pretext analysis. Employee asserts four arguments in support of a pretext claim: (1) his immediate supervisor concealed from the second level supervisor and human resources information and goals in the plan; (2) the plan and forced resignation was issued on the day he returned from leave; (3) employer gave less than the claimed standard thirty days to improve; and (4) the claim that employer decided to issue the plan prior to the request for leave was developed "after-the-fact." The court rejected each of these arguments noting that: (1) employee fails to present any evidence that the supervisor had to provide information to the mentioned individuals, that there was an actual concealment or one for discriminatory motives; (2) the temporal proximity alone does not establish pre-text, especially in light of the fact that the decision to issue the plan was made before the request for leave; (3) the provision of the shorter time frame is not pre-textual because the decision was made before the request for leave and, thus, cannot be connected to the exercise of FMLA rights and the evidence failed to show that a thirty-day period was "standard"; and (4) the evidence establishes that the decision to issue the plan was made before the request for leave, even if the plan itself was not drafted until after employee returned from leave.

The court denied employer's motion for summary judgment on the interference claim because intent is not an element of the claim. In this case, the performance standards employee was expected to meet May have been impossible because employee was on FMLA leave. Failure to adjust performance expectations to account for FMLA leave could create an interference claim.

***Miles v. Am. Red Cross*, No. 17-CV-14-GKF-FHM, 2017 WL 5491004 (N.D. Okla. Nov. 15, 2017)**

Pursuant to Federal Rule of Civil Procedure 12(b)(6) employer moved to dismiss employee's amended complaint alleging interference with FMLA medical leave. Employee

alleged that she was required to work and perform more than *de minimus* tasks and assignments. The court concluded that employee sufficiently alleged that employer knew and/or showed a reckless disregard for whether its alleged interference was prohibited by the FMLA. However, the court found that the facts alleged in the amended complaint did not support an involuntary leave FMLA interference claim. An involuntary leave FMLA interference claim may exist when an employer forces an employee to take FMLA leave when the employee does not have a serious health condition that precludes her from working. An involuntary leave FMLA interference claim ripens when and if the employee seeks FMLA leave at a later date and the leave is not available because the employee was wrongfully forced to use FMLA leave in the past. The court found that employee had a serious health condition and that the employer did not force her to take FMLA leave and that the claims in the amended complaint did not implicate "involuntary leave" interference. The court also rejected employee's FMLA interference termination claim because employee was terminated well after her FMLA leave time was exhausted. Employee's retaliation claim was similarly dismissed. Employer's failure to provide employee an accommodation to return to work did not violate the FMLA and could not support a claim of retaliation.

***Shann v. Atlantic Health Sys.*, No. CV124822ESMAH, 2017 WL 5260780 (D.N.J. Nov. 13, 2017)**

Employee worked as a computer support specialist for employer. In the course of his employment, he applied for and was granted several instances of FMLA leave. In between those leaves, employer revoked a telecommuting privilege that had been extended to employee. Ultimately, employee was fired for alleged theft of equipment and unauthorized deletion of computer data.

Employee brought a number of claims against employer, including FMLA claims of interference and retaliation, before the federal district court for the District of New Jersey. On a motion for summary judgment, the court dismissed the interference claim. The court noted that employee had been granted all of the leaves that he had requested. Acknowledging that some courts have permitted interference claims to survive notwithstanding such a fact, the court found recent Third Circuit precedent to be controlling. Quoting those cases, it held that, "for an interference claim to be viable, the plaintiff must show that FMLA benefits were actually withheld."

However, the court denied summary judgment on the retaliation claim, which was based on the revocation of the telecommuting privilege. In doing so, the court noted that prior Third Circuit precedent had held that FMLA retaliation claims must result in an adverse employment action that alters terms and conditions of employment. The standard differs from that recently established by the United States Supreme Court for Title VII retaliation claims, which now only require a more lenient "materially adverse" standard. The court found that the Third Circuit has implied that it would follow the current Title VII standard for FMLA retaliation claims. The correct analysis, the court concluded, is whether a fact finder could find that revocation of the telecommuting privilege was "materially adverse in that it well might have dissuaded a reasonable worker from exercising a right under the FMLA."

***Herndon v. U.S. Bancorp Fund Servs., LLC*, No. 1:15-cv-751, 2017 WL 4349057 (S.D. Ohio Sept. 29, 2017)**

Employee began working as a business development officer for employer, a bank, in 2005. Employee's position required him to travel extensively and he was issued a corporate credit card for his travel expenses. In 2008, employee began to fall behind on submitting expenses for reimbursement, and his problems with submitting expenses continued over the next two years, resulting in various verbal and written warnings. In 2010, employer assigned an administrative assistant to employee in order to assist in him submitting expense reports. Nevertheless, employee continued to struggle and was ultimately disciplined several more times. Employee attributed his failure to timely submit reports to his Attention Deficit Hyperactivity Disorder ("ADHD"). In early August 2013, employer's human resources department suggested that employee reach out to employer's third-party FMLA administrator and apply for intermittent FMLA leave. Employee did so, but failed to submit any paperwork in support of his request. As a result, his request was denied. Employee was terminated a few months later.

Employee filed suit, alleging interference and retaliation in violation of the FMLA, along with several other state and federal law claims. Employee claimed the employer had interfered with his rights under the FMLA by threatening to hire another salesperson to cover employee's territory if he went out on leave. The court rejected this claim, noting that the FMLA does not prohibit an employer from hiring another individual to cover for someone on leave. The court found further that employee's fear of losing his job was insufficient to support an interference claim. Similarly, the court rejected employee's retaliation claim, finding that employee had not established a sufficient causal connection between his alleged protected activity and his termination. The court highlighted the fact that the "friction" between employee and his employer existed long before he applied for intermittent FMLA leave.

***Garza-Delgado v. United Indep. Sch. Dist.*, No. 5:16-CV-49, 2017 WL 4326561 (S.D. Tex. Sept. 27, 2017)**

Employee worked in the school district's IT department. Over the course of her employment, employee took three leaves of absence. Each was approved, and employee returned to work after each leave. Over several years, employee was cited for various performance issues. As a result of a final incident (an insurance company believed that employee forged the signature of an HR employee), employee's employment was terminated. Employee filed a lawsuit alleging interference and retaliation in violation of the FMLA. Employee also alleged a claim of hostile work environment in violation of the FMLA. Employer moved for summary judgment, which the court granted.

In regard to the interference claim, employee alleged she was subjected to interference because she was terminated after constant harassment over whether she "needed to be a parent" or whether she planned on taking more FMLA leave in the future. She alleged that she was asked the question of taking more FMLA in the future a month before being terminated and insisted that she was fired because she refused to provide an answer about her future plans. The court granted summary judgment because employee failed to show either that employer refused to authorize FMLA leave or discouraged her from using such leave. All of employee's prior requests for FMLA leave were granted. There was no evidence that employee's FMLA leave was shortened or hindered in any manner or that employers attempted to discourage employee from taking FMLA leave when she requested it. As to being fired a month after being asked

about additional leave, the court ruled that this argument was mere conjecture. Further, such an argument ignored the requirement that an employee needed to be entitled to leave at the time that her FMLA rights were allegedly interfered with.

As to the retaliation claim, the court ruled that employer presented legitimate, non-retaliatory reasons for the termination. The termination paperwork contained numerous reprimand letters and other documentation describing employer's disciplinary issues with employee over the course of several years. As to the final violation (an allegation of falsifying a document), even if employee did not commit the violation, employer had a genuine belief that employee committed the infraction.

As to employee's FMLA hostile work environment claim, the court stated that the Fifth Circuit has never recognized an independent claim for a hostile work environment in the FMLA context.

***Dudley v. N.Y.C. Hous. Auth.*, No. 14 Civ. 5116 (PGG), 2017 WL 4315010 (S.D.N.Y. Sept. 25, 2017)**

Employee worked in the IT department for the New York City Housing Authority. Employee applied for and was granted intermittent FMLA leave for weekly therapy sessions to treat his anxiety and depression. Employee later sought to expand the intermittent FMLA leave to cover treatment for his respiratory and sinus conditions. Employee alleged in his lawsuit that employer interfered with his FMLA rights by initially denying his request to apply his intermittent FMLA leave to his respiratory and sinus conditions, and only approved the request "months … after" employee filed a complaint.

Employer moved for summary judgment. Employer argued that there was no dispute that the FMLA request was approved. As to initially denying the request, employer argued that there was no evidence that any complaint was filed or that employer denied the request. The court granted the motion.

In granting the motion, the court found that employee offered no evidence concerning the nature or substance of the complaint, when he made the complaint, to whom he made the complaint, or the form in which he made the complaint. As to the allegation of denying the FMLA request (which employee alleged occurred in an e-mail), employee did not present evidence of the purported e-mail denying the request and the time records did not substantiate that employer treated the absences as uncovered. Accordingly, the court found that summary judgment was appropriate in light of employee's allegations being speculative and conclusory.

***Mejia v. Roma Cleaning, Inc.*, No. 15-cv-4353 (SJF) (GRB), 2017 WL 4233035 (E.D.N.Y. Sept. 25, 2017)**

Employee brought suit against employer for FMLA interference and retaliation. The Magistrate Judge recommended that summary judgment be denied. Employer objected to the Magistrate Judge's recommendation. The court reviewed the Magistrate Judge's recommendation, then granted summary judgment to employer and dismissed employee's suit.

First, the Magistrate Judge said that even though it was undisputed that employer had provided FMLA training to its managers, a jury could reasonably determine that employee's manager had disregarded such training, and therefore was reckless in terminating employee, and

therefore employee was entitled to proceed with her case under a three-year statute of limitations. The statute of limitations for FMLA violations is two years, unless the employee can show that employer acted *willfully*. However, the court said employee had not presented any evidence that her manager had disregarded the FMLA training. The court ruled that any of employee's claims made outside of the two-year time limit were time-barred.

Second, the Magistrate Judge found that a jury could reasonably determine that, per the manager's deposition testimony, employee's supervisors were angry that she had been a "no call/no show" and their anger provided the basis for an adverse employment action – switching employee from full-time to part-time. However, the court stated that switching employee to part-time status was not an adverse employment action. In fact, the switch demonstrated employer's willingness to accommodate employee.

Third, the Magistrate Judge based his recommendation to deny summary judgment to employer on employer's purported "inconsistent explanations under oath about employee's termination." Employer stated in its memorandum in support of its motion for summary judgment that it decided to switch employee from full-time to part-time as a result of her repeated absences and late arrivals to work over a six-month span. The Magistrate Judge agreed with employee that this notion was undermined by employer's interrogatory answer, which said, "Defendants did not terminate Employee's employment. Employee abandoned her job when she was informed that, as a result of her numerous instances of unexcused tardiness and absences, her position would be temporarily reduced from 40 hours to 32 hours per week so as to allow her [to] deal with any family or personal issues during the course of the week." The court agreed with employer that these two statements were not inconsistent. They both conveyed that, based on employee's tardiness and absences, employer proposed to change her schedule from full-time to part-time. Summary judgment was granted to employer, and employee's suit dismissed.

***Harris v. Chi. Transit Auth.*, No. 14 C 9106, 2017 WL 4224616 (N.D. Ill. Sept. 22, 2017)**

Employee, a Chicago Transit Authority bus driver, brought suit against employer for interference with FMLA leave. Employer moved for summary judgment. The court granted employer's motion for summary judgment in part and denied in part. First, the court found that employer did not interfere with employee's right to FMLA leave for the period beginning on November 11, 2013. The court reasoned that employee's FMLA leave request beginning on November 11, 2013, was correctly denied because she failed to submit requested medical certifications or recertifications. Employer was entitled to request these medical certifications and recertifications since employee had exceeded a previous FMLA leave that commenced on February 28, 2013.

Second, the court found that employer wrongfully denied employee her FMLA leave on July 4, 2011, and between September 20, 2013, and November 11, 2013 ("Denial Period'). The court reasoned that employee clearly testified during her deposition that her request for FMLA leave was interfered with by employer. Employer's motion failed to argue or account for employee's Denial Period. Thus, employer failed to meet its burden of showing that there is no genuine dispute of material facts as to whether it wrongfully denied employee her FMLA leave for the Denial Period.

***Kercher v. Reading Muhlenberg Career & Tech. Ctr.*, No. 5-6674, 2017 WL 3917630 (E.D. Pa. Sept. 6, 2017)**

Employee sued her former employer for interference and retaliation in violation of the FMLA. Employee claimed employer interfered with her FMLA rights by failing to timely provide her with FMLA paperwork, which delayed her application for FMLA, and by giving her duties to perform while she was out on FMLA leave. Employee claimed employer terminated her employment in retaliation for her FMLA leave.

The district court granted summary judgment to employer on employee's interference claim, because the undisputed facts established that employee requested and was granted FMLA leave – notwithstanding an alleged delay in providing FMLA paperwork. In addition, the court concluded that employee had not cited to any evidence, other than her own unsupported allegations, to support her claim of having to perform duties while FMLA leave. The court noted that such allegations were precluded by her own testimony that she slept 20 to 22 hours per day while on FMLA leave.

The district court denied summary judgment on employee's retaliation claim. In doing so, the court first concluded that the eight months between her leave and termination did not establish temporal proximity sufficient to prove a causal connection. But, it concluded that employee could rely on other evidence to establish causation and found that there were disputes of fact as to whether employee's boss exhibited a pattern of ongoing antagonism toward her, between the time of her taking FMLA leave and her termination, to establish a causal connection.

***Kordistos v. Mt. Lebanon Sch. Dist.*, No. 16-615, 2017 WL 3593882 (W.D. Pa. Aug. 21, 2017)**

Employee sued his former employer for interference and retaliation in violation of the FMLA related to the termination of his employment. Both claims were based on the same basic set of factual allegations. Upon employee's return from FMLA leave, he was returned to his same position but he claimed that a number of his duties were not returned to him and, instead, were done by individuals who had performed the duties while he was on leave. Approximately one year after employee returned from FMLA leave, employer eliminated his position, and he was laid off.

Employer filed a motion for summary judgment. The district court denied employer's motion as to the interference claim and granted the motion as to employee's retaliation claim. As to the interference claim, the court concluded that there were disputes of fact as to whether or not significant parts of employee's job duties were not returned to him upon his return from leave. If the fact finder were to believe employee's allegations that this had occurred, it would support his claim that he was not returned to his position upon return from FMLA leave. As to the retaliation claim, the court concluded that the seven month lapse of time between his return from leave and the decision to terminate his employment was not sufficient to prove a causal connection but that the failure to return his job duties to him could be evidence of antagonism sufficient to establish such connection. Nevertheless, the court concluded that employer articulated a non-retaliatory reason for the termination – budget cuts and cost-cutting – and employee failed to provide sufficient evidence of pretext. The fact that the elimination of some of his job duties made him more vulnerable to a potential layoff did not suffice. Moreover, the fact that two other employees were laid-off supported employer's cost-cutting justification.

***McCalla v. City of N.Y.*, No. 15 Civ 8002 (LAK) (AJP), 2017 WL 3601182 (S.D.N.Y. Aug. 14, 2017)**

A group of ten employees filed a series of claims against their employer, including one employee who asserted claim for FMLA interference. Employee previously had taken intermittent FMLA leave for breast cancer treatment. Subsequently, in discussions about her potential application for a higher level position, she claims that the head of the unit where the position was located made a comment "I think you should take care of your health first." Employee claimed this remark was designed to discourage her from applying for the higher level position.

The district court granted summary judgment to employer on this claim on the grounds that no reasonable jury could interpret the unit head's comment about employee's health as an attempt to discourage her from exercising her rights under the FMLA. The court noted that to the extent employee was attempting to assert a novel claim that allegedly discouraging her from applying for the position constituted FMLA interference, it was not supported by the case law and, in any event, would fail because employee actually applied for the position.

***Keller v. Lackawanna Cnty.*, No. 3:15-2511, 2017 WL 3268154 (M.D. Pa. Aug. 1, 2017)**

Employee worked for defendant Lackawanna County. At an unspecified time prior to April 27, 2015, employee provided a detailed doctor's note to employer to notify employer of upcoming absences. Employee believed the doctor's note provided all that was necessary to comply with regulations set forth in the Family Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq*. After receiving the doctor's note, employer failed to provide employee with a date to return any additional FMLA certification. Nonetheless, on June 8, 2015, employee provided an FMLA certification, which employer subsequently denied. Employer did not advise employee as to what was allegedly deficient in the certification that warranted its denial or provide a cure period to fix the certification. Employer subsequently terminated employee on or about June 16, 2015. Employee received a termination letter, which specifically noted the alleged deficiencies with the FMLA certification and the absences from work as some of the causes for her firing. Employee filed a complaint against employer for FMLA interference and retaliation. Employer moved to dismiss employee's interference claim.

Interference with FMLA rights can include not only refusing to authorize FMLA leave but discouraging an employee from using such leave. It also can include an employer's failure to *advise* the employee of their rights under the FMLA. In order to prevail on an interference claim based on a failure to advise, however, an employee must show prejudice by establishing that this failure to advise rendered the employee unable to exercise that right in a meaningful way, thereby causing injury. The court stated that in this case, employee based her FMLA interference claim on employer's alleged failure to notify her of her FMLA obligations regarding certification and its alleged failure to give her an opportunity to cure her deficient certification. However, even in her second amended complaint, employee did not demonstrate prejudice.

Employer argued that employee's interference claim should be dismissed, because it was identical to her retaliation claim. The court disagreed, stating employee was not alleging that her being terminated interfered with her FMLA rights. Rather, she alleged that specific acts on the part of employer led to denial of leave and, thereafter, her termination. Employer also argued that employee's interference claim should be dismissed, because "[c]ourts have refused to

recognize a valid claim for interference in the absence of any injury." *Chapman v. UPMC Health Sys.*, 516 F. Supp. 2d 506 (W.D; Pa. 2007). The court agreed. Employee's interference claim was dismissed without prejudice, and the court said it would allow employee to amend her second amended complaint a final time to allege prejudice and injury.

***Basham v. Select Specialty Hosp.*, No. 2:15-15432, 2017 WL 2385348 (S.D. W.Va. June 1, 2017)**

Employee brought an FMLA interference claim under 29 U.S.C. § 2615(a)(1), as well as a retaliation claim under 29 U.S.C. §2615(a)(2). The court granted employer's motion for summary judgment as to employee's interference claim and denied it with respect to the retaliation claim. The court held that although an interference claim requires merely proof that employee was denied FMLA entitlements, a retaliation claim requires proof of discriminatory or retaliatory intent.

First, employer's motion for summary judgment as to employee's interference claim was granted, as the court held that employee's claim did not demonstrate actual harm. Employee's initial complaint contended that employer attempted to interfere with employee's ability to use FMLA leave by both counseling employee on her absences, and falsely informing her that her leave would not be protected unless she expressly mentioned the FMLA. Employee did not suffer any damages on account of either claim in her complaint; rather, she was terminated because she failed to recertify her leave on time. In response, employee did not rebut employer's assertions, but rather alleged a new complaint: that employer interfered with her FMLA rights by terminating her employment. Because employee's initial interference theory was not supported by the facts, and her response brought forth a new claim too late, the court granted summary judgment.

Second, employer's motion for summary judgment as to the retaliation claim was denied because employee made out a *prima facie* case of retaliatory intent sufficient to survive summary judgment. The court identified three contentions that demonstrate retaliatory intent. First, employee contends that the timing of the FMLA recertification process was outside of the normal timeframe. Usual intervals for her FMLA requests were every nine months, and this was requested less than six months later. Second, employee alleges that employer ignored other company policies to justify her termination, such as counseling opportunities before termination. Third, the court held employer's explanation for employee's termination to be unbelievable, given employee's long employment at the company, her attempt to re-certify her FMLA paperwork on time, and employer's initiation of employee's termination process before the paperwork deadline. On the basis of these facts, the court denied summary judgment on the retaliation claim.

***Spears v. Water & Sewage Auth. of Cabarrus Cnty.*, No. 1:15cv859, 2017 WL 2275011 (M.D. N.C. May 24, 2017)**

Employer began to employ employee in 1996 as an Electrical and Instrumentation Technician. Later employee was promoted to supervisor. He was terminated on October 14, 2013. The case was before the United States District Court for the Middle District of North Carolina on employer's motion for summary judgment, and the motion was granted in its entirety.

As a result of a back strain, Employee had a light duty work restriction and was limited to lifting no more than 20 pounds. Employee never asked for sick leave or medical leave. He sued for violation of the FMLA. In the complaint, employee alleged employer interfered with his right to take leave by terminating him and failing to provide FMLA leave "as needed due to his injury and disabling condition." In his briefing in opposition to the motion for summary judgment, employee claimed that employer had interfered with his FMLA rights to take leave to attend his son's medical appointments and that the company had discharged him in retaliation for exercising his rights under the FMLA.

The court granted summary judgment, finding that employee's son's medical appointments were outside of the pleadings, and that employee could not raise a new claim after discovery unless he amended the complaint, which he failed to do. The court dismissed claims involving employee's son on this ground. Employee was unable to establish an interference claim regarding his back injury because he could not establish that he ever asked for or sought time off because of it. In fact, employee adamantly denied that he ever sought FMLA leave or informed his supervisors about any need for leave until his unexplained absences were made a ground of a negative evaluation of his work.

Employee could not establish a retaliation claim because he never requested FMLA leave and never pleaded the claim in his complaint.

***Duane v. IXL Learning, Inc.*, No. C 17-00078 WHA, 2017 WL 2021358 (N.D. Cal. May 12, 2017)**

Employee brought suit against his former employer alleging retaliation and wrongful termination in violation of the FMLA. Employee also alleged wrongful termination in violation of public policy against both the company employer and its CEO. Prior to bringing suit, employee filed a claim with the NLRB alleging violations of the NLRA Section 8(a), and the NLRB filed a complaint on employee's behalf.

Employers moved to dismiss employee's claims, arguing that employee failed to allege facts sufficient to support a plausible inference of violation of the FMLA. Employers also moved to dismiss employee's claim against the CEO for wrongful termination in violation of public policy, which the court granted. In moving to dismiss employee's claims under the FMLA, employers asked the court to take judicial notice of the ALJ's order, which found that employee's actions prior to his termination did not constitute protected concerted activity under Section 8(a).

The court declined to take judicial notice of the ALJ's finding regarding the motivation for employee's termination and held that employee had alleged facts sufficient to state a claim that his termination – the adverse action – was causally related to his FMLA leave. Accordingly, the court denied employers' motion to dismiss employee's claim for retaliation under the FMLA.

Since employee had pled sufficient facts in support of his claim of interference with his rights under the FMLA, he was also found to have pled facts sufficient to support his claim that his termination was related to his FMLA leave. Therefore, the court denied employer's motion to dismiss, noting that termination in violation of the FMLA also constitutes violation of public policy under California law.

***Lawson v. CertainTeed Corp.*, No. CV 1:16-0238, 2017 WL 1498511 (W.D. La. Apr. 24, 2017)**

Employee, a Quality Manager at CertainTeed. filed suit asserting that his termination was in retaliation for asserting his FMLA rights and that employer interfered with his right to take FMLA leave. Employers filed a motion for summary judgment to dismiss employee's retaliation claims for wrongful termination under the FMLA. Employee maintains that his resignation was not voluntary, yet he did not provide any evidence to prove this assertion and therefore the court found that employee's resignation was voluntary. However, the court considered employee's resignation as involuntary to determine if the resignation was considered an adverse employment action that interfered with employee's FMLA rights or was in retaliation for employee's asserting his FMLA rights. Employee admitted that he was granted all of the FMLA leave he requested and none of his FMLA leave requests were denied during his employment with employer. Therefore, the court found that employee could not establish that his separation from employment resulted in a denial of benefits he was entitled to under the FMLA, nor could he establish that employer interfered with his FMLA rights during his employment.

Employee further failed to establish a *prima facie* case of retaliation. He failed to show that he engaged in a protected activity, and also failed to establish a causal connection between an alleged protected activity and the adverse employment action. Employer was able to establish a legitimate nondiscriminatory reason for terminating him from his employment, namely employee's refusal to sign a Last Change Agreement, and his refusal to acknowledge and agree to improve his disruptive, unprofessional and insubordinate behavior as well as his excessive non-FMLA-covered absences from work.

***Kuehne v. Arlington Heights Park Dist.*, No. 1:15-CV-06525, 2017 WL 1386177 (N.D. Ill. Apr. 18, 2017)**

Employee sued Arlington Heights Park District claiming that employer interfered with and retaliated against him in violation of the FMLA. Employer moved for summary judgment and the motion was granted by a district court in Illinois.

Although employee was placed on light duties at various times as part of his job duties, his primary job duties required him to lift up to seventy-five pounds without assistance and to climb and work on ladders. After employee returned from FMLA leave resulting from his diabetes, he presented employer with a doctor's form, but employer asked for further information from his doctor and placed him on paid administrative leave. Employee then provided employer with a form stating that he was free to return to work with no restrictions, but employer asked employee to take a functional capacity exam and made an appointment for him to do so. However, employee cancelled the exam and did not return to work after the expiration of his administrative leave. Employee admits that he did not provide a date by which he could return to work. Employer, after employee's multiple absences decided to terminate employee. The court found that employee's interference and retaliation claims under the FMLA failed given that employee had been intermittently absent from work, could not provide employer with a date for his return to work, and could not perform his job's essential functions.

***McCann v. Earth Sense Energy Sys., Inc.*, No. 16-C-1310, 2017 WL 1383728 (E.D. Wis. Apr. 18, 2017)**

Employee brought suit against her former employer under the Family and Medical Leave Act for retaliating against her for exercising her rights under the FMLA. Employee alleged that senior employees of employer harassed her after she began using FMLA leave to attend to her recent cancer diagnosis. Employer moved for summary judgment, which was denied by the United States District Court for the Eastern District of Wisconsin.

The court held that materially adverse actions are not limited to employment-related activities, but rather include any actions that would dissuade a reasonable employee from exercising her rights under the FMLA. See *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 67 (2006). The court further found that even if the facts as alleged would not have precipitated quitting by a reasonable employee, being harassed could certainly dissuade a reasonable employee from exercising her FMLA rights.

***Ejiogu v. Grand Manor Nursing & Rehab. Ctr.*, No. 15CV505 (DLC), 2017 WL 1322174 (S.D.N.Y. Apr. 5, 2017)**

Employee sued her former employer for interfering with her right to take FMLA leave and retaliating against her for taking it. This comes to the court on a motion for reconsideration of the court's opinion and order dismissing employee's interference and retaliation claims under the FMLA.

Employee argued in her FMLA interference claim that she was not restored to an equivalent position upon return from FMLA leave. The court found that employee's motion did not include admissible evidence from which a jury could conclude that the positions were not equivalent because she failed to identify ways in which her job upon her return to work after her FMLA leave would not be considered equivalent under the FMLA. Employee argued in her FMLA retaliation claim that the court's previous determination relied on the wrong body of law as to what constitutes an adverse employment action. Though the court found that employee did correctly identify an error on what constitutes an adverse employment action, the use of the correct definition for an adverse employment action had no impact on employee's complaint that she was fired in retaliation for her opposition to a change in her job duties. The court explained that the error was in applying precedent defining an adverse employment action in a discrimination context when addressing an adverse employment action in a retaliation context, although it was harmless error in this instance.

***Bouchard v. City of Warren*, No. 14-14009, 2017 WL 1196358 (E.D. Mich. Mar. 31, 2017)**

Employee was a City Planner for employer, and appeared without authorization at City Council meetings where he assisted in a presentation that raised questions and concerns about the appropriateness or legality of employer's policies, rules, and procedures. Employee was reprimanded for this incident and similar ones that followed. On June 21, 2014, employee submitted a doctor's note indicating he would not be at work from June 23 to July 6. On July 2, employee requested leave under the FMLA. On July 3, his FMLA leave request was granted for June 23 through July 7 with notice that leave would be extended upon physician approval, and a reminder that he would be required to undergo a fitness for duty evaluation before returning to work. Employee's union submitted a letter to employer detailing the reasons he felt he had been

harassed or retaliated against concluding that he had no reason to believe the harassment would stop, and thus intended to resign.

The court denied employer's motion for summary judgment on employee's FMLA claim that he was constructively discharged. The court found that a genuine issue of material fact existed whether employee gave employer notice of his intent to take leave and that the statement that employee made indicating he would return to work as soon as he could created a question of fact as it relates to notice. The court further explained that employer requiring employee to submit to and pass a fitness for duty evaluation before returning to work constituted evidence that employer was concerned that employee suffered a serious health condition. With regard to employer's argument that employee's FMLA interference claim is unripe because he never attempted to go back to work, the court found that the argument failed because employer did not raise this argument in its motion to summary judgment, and employer ignored that a constructive discharge is a material adverse employment action and that event would preclude employee's ability to return to work. Therefore, the court denied employer's motion for summary judgment on employee's FMLA claim.

***Corbin v. Med. Ctr., Navicent Health*, No. 5:15-CV-153 (CAR), 2017 WL 1241430 (M.D. Ga. Mar. 31, 2017)**

After the district court held a pretrial conference, it decided that employee May only proceed to trial on her FMLA retaliation claim and not her FMLA interference claims. Employee's FMLA interference claims were based on three theories, that employer interfered with her exercise of FMLA leave by: (1) deterring or discouraging employee from using approved intermittent leaved; (2) failing to inform employee she May be entitled to intermittent leave after being placed on notice that employee's daughter suffered a serious medical condition; and (3) assessing negative attendance points for exercising protected leave. The district court in Georgia found that none of these theories were viable, however, because she could not show that she was prejudiced by the alleged technical violations of the FMLA. Employee could not show prejudice because she received all of the FMLA leave she requested and would still have been on probation for attendance violations even if the allegedly wrongly-assessed attendance points were not considered.

***Toliver v. City of Jacksonville*, No. 3:15-CV-1010-J-34JRK, 2017 WL 1196637 (M.D. Fla. Mar. 31, 2017)**

Employee brought FMLA retaliation and interference claims against his former employer, the City of Jacksonville, Florida. Employee was a corrections officer and requested FMLA leave as a result of an automobile accident, which required multiple surgeries to his leg. The court granted summary judgment on the interference claim but did not consider the merits of employee's retaliation claim because employer failed to reference or discuss the claim in its motion for summary judgment.

With respect to the interference claim, employee argued that employer interfered with his FMLA rights by failing to notify him of his rights and provide FMLA leave for his health condition. Employer argued that it granted employee's FMLA leave request upon every submission and reminded him of his ability to request leave upon his return to work following his second surgery. In holding that no reasonable jury could find that employer interfered with employee's right to FMLA leave, the court relied upon the following evidence: (1) employee

repeatedly availed himself of his FMLA rights during the term of his employment – between 2011 and 2014, employee was permitted to take FMLA leave no less than four times, and none of his requests were denied; (2) Upon returning to work after his surgery in 2014, employee admits that he never again requested to use FMLA leave despite being informed, via email, of the availability of his remaining FMLA leave.

***Doe v. Mylan Pharms., Inc.*, No. 1:16CV72, 2017 WL 1190919 (N.D. W.Va. Mar. 30, 2017)**

An employee with a history of suffering seizures brought suit against his former employer, a pharmaceutical company, alleging disability discrimination and failure to reasonably accommodate in violation of the ADA and a state statute. Employee allegedly sustained multiple seizures while at work requiring him to take leave. On one such occasion, employee sought to return to work after one month of leave and he provided his employer with a doctor's note indicating that he was restricted from driving or operating heavy machinery. Employee alleged that employer prevented him from returning to work, which cause him to use accrued vacation leave to avoid incurring unpaid leave. Employee subsequently filed an amended complaint asserting an additional claim of FMLA inference. Employer filed a motion to strike the amended complaint as it was filed one day beyond the deadline or, in the alternative, a motion to dismiss for failure to state a claim. In sum, employee's amended complaint alleged that his employer interfered with the use of his FMLA leave by forcing him to use up his days of medical leave when he was not medically required to be off work, and by prohibiting him from returning to work after he had requested that his FMLA days be preserved. Because the amended complaint did not allege that his employer denied, interfered with, or otherwise hindered his request for FMLA leave, the district court granted the motion to dismiss for failure to state a claim.

***Payne v. Hammond City*, No. CV 15-1022, 2017 WL 1164343 (E.D. La. Mar. 29, 2017)**

A police officer brought suit against a police chief for two claims under the FMLA: (1) interference with her substantive rights under the FMLA by failing to restore her to the same or equivalent position, and (2) retaliation for exercising her FMLA rights. The employee officer took an FMLA leave of more than five months duration. On the day she returned to work, the police chief placed her on administrative leave. The chief claimed this adverse action did not violate the FMLA, given that the 12-week period of FMLA leave had expired by the time the officer returned to work; thus, the employee's return occurred after a period of unprotected sick leave. The officer alleged that the chief was acting in the capacity of an employer when he put her on administrative leave.

The district court granted the chief's motion to dismiss the FMLA claims. First, the court held that the officer's right to reinstatement expired because the officer failed to return to work on or before the expiration of her 12-week FMLA period. Therefore, placing the officer on administrative leave did not constitute interference with her substantive FMLA rights. Second, the court held that the employee officer did not allege sufficient facts to state a retaliation claim, given that it was unclear whether the chief qualified as an "employer" for FMLA purposes. It was unclear whether the chief had sufficient managerial control over the officer's employment, rate of pay, or employment records such that the chief could be considered an employer under the FMLA. (Note: The court originally granted the employee officer leave to amend to cure the deficiencies in her FMLA claims. When the officer failed to amend in the specified time, the court granted the chief's motion to dismiss.)

***Kortyna v. Lafayette Coll.*, No. CV 15-4625, 2017 WL 1134129 (E.D. Pa. Mar. 27, 2017)**

Employee brought suit against employer for FMLA interference and retaliation. Employee alleged that employer interfered with his FMLA rights when it delayed in letting him return to campus when he was "medically capable." Additionally, employee alleged that employer retaliated against him for exercising his right to take FMLA leave when employer instructed him to honor a "no-contact order" after he filed sexual harassment charges against the two students named in the "no-contact order." Employer filed a motion to dismiss both of employee's FMLA claims. The court denied employer's motion to dismiss employee's FMLA interference claim and granted its motion to dismiss employee's FMLA retaliation claim. The court held that employer's delay in letting him return to campus when he was "medically capable" of returning was an interference of his FMLA rights. However, the court held that employer's discussion of the "no-contact order" with employee was insufficient to establish a causal connection between the invocation of employee's FMLA rights and the termination of his employment.

***Crain v. Schlumberger Tech. Co.*, No. CV 15-1777, 2017 WL 713673 (E.D. La. Feb. 23, 2017)**

Employee, a regional sales manager, brought suit against his employer alleging it interfered with his FMLA leave rights when it terminated his position as part of a reduction in force. At trial, a jury found that employer had interfered with employee's FMLA leave rights and awarded him damages. Employer moved the court for judgment as a matter of law, or, alternatively, a new trial or remittitur. A Louisiana district court denied employer's motion and rejected its arguments. First, the court rejected the argument that the interference claim was duplicative of his previously dismissed retaliation claim and should therefore be dismissed. The court noted that interference claims and retaliation claims are distinct. The retaliation claim was dismissed because the court found employer did not act with discriminatory intent when it terminated him. However, interference claims do not require a showing of discriminatory intent. Second, the court rejected the argument that there was insufficient evidence elicited at trial to support the jury's findings on almost every element of FMLA interference.

Employer claimed that employee was not entitled to leave. The court found that the jury reasonably concluded that employee suffered a serious health condition under the FMLA because his foot surgery rendered him unable to drive and therefore travel. The court found it was not an unreasonable conclusion that traveling for ten days out of the month was an essential function of employee's employment. Employer also claimed employee did not give adequate notice of his need for FMLA leave. The court found it was not unreasonable for the jury to find that employee's inquiry about short term disability gave notice to employer of his possible need for leave. Employer also claimed there was not sufficient evidence to conclude it interfered with employee's leave rights because the decision to terminate employee as part of a reduction in force was made weeks before anyone knew he would require surgery. The court noted that there was no documentation to support this. Thus, as the jury considered other evidence as well, the jury's finding of interference was not unreasonable. Finally, employer took issue with the jury's award of $77,007, the amount of employee's severance, arguing it was not a guaranteed benefit. However, evidence indicated that severance is offered to employer's employees terminated through a reduction in force. Thus, the jury was not unreasonable in finding employee would have been offered a severance package if he had been terminated sometime after taking FMLA leave.

The court also granted employee's motion for liquidated damages, costs, and attorney's fees pursuant to 29 U.S.C. § 2617. The court found that employer did not carry its substantial burden to prove good faith, which is required to overcome the presumption of entitlement to liquidated damages. There was sufficient evidence at trial that cast doubt on employer's claim that it never received employee's inquiry regarding short term disability, and testimony showed that employee's former boss and two human resources representatives were aware of his impending surgery prior to his termination. Thus, the court concluded that the failure to consider the possible application of FMLA leave prior to employee's termination cannot be said to be reasonable or in good faith. An appeal to this decision was filed on March 6, 2017 and dismissed on August 9, 2017 after a stipulation of dismissal was filed by the parties.

Summarized elsewhere:
***DePaula v. Easter Seals El Mirador*, 859 F.3d 957 (10th Cir. 2017)**

***Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261 (11th Cir. 2017)**

***Caplan v. L BrandsVictoria's Secret Stores*, 704 F. App'x 152 (3d Cir. 2017)**

***Chatila v. Scottsdale Healthcare Hosps.*, 701 F. App'x 639 (9th Cir. 2017)**

***Ramirez v. Bolster & Jeffries Health Care Grp., LLC*, No. 1:12-CV-00205-GNS-HBB, __ F. Supp. 3d __, 2017 WL 4227944 (W.D. Ky. Sept. 22, 2017)**

***King v. Mestek, Inc.*, No. 3:15-cv-30071-MAP, __ F. Supp. 3d __, 2017 WL 4125253 (D. Mass. Sept. 18, 2017)**

***Jordan v. Cnty. of Chemung*, 264 F. Supp. 3d 497 (W.D.N.Y. 2017)**

***Long v. Endocrine Soc'y*, 263 F. Supp. 3d 275 (D.D.C. 2017)**

***Davis v. Kimbel Mech. Sys., Inc.*, No. 5:16-CV-5194, __ F.R.D. __, 2017 WL 4810707 (W.D. Ark. Oct. 25, 2017)**

***Diamond v. Am. Fam. Mut. Ins. Co.*, No. 4:16-00977-CV-RK, 2017 WL 5195881 (W.D. Mo. Nov. 9, 2017)**

***Tanzarella v. Intertek Asset Integrity Mgmt., Inc.*, No. 1:17-cv-361, 2017 WL 4919178 (N.D. Ohio Oct. 31, 2017)**

***Dallefeld v. The Clubs at River City, Inc.*, No. 1:15-cv-01244-JES-JEH, 2017 WL 4621775 (C.D. Ill. Oct. 16, 2017)**

***Robey v. Weaver Popcorn Co., Inc.*, No. 1:16-CV-281-TLS, 2017 WL 4539914 (N.D. Ind. Oct. 11, 2017)**

***Stewart v. Physicians Support Servs., Inc.*, No. 14-CV-195-JED-FHM, 2017 WL 4274711 (N.D. Okla. Sept. 26, 2017)**

***Moore v. Computer Sciences Corp.*, No. 5:15-cv-00683-MHH, 2017 WL 3873777 (N.D. Ala. Sept. 5, 2017)**

***Calahan v. Pain Mgmt. Grp., P.C.*, No. 3:16-cv-0847, 2017 WL 3237579 (M.D. Tenn. July 31, 2017)**

***Tarrant v. Hamilton Twp. Sch. Dist.*, No. 16-7058 (FLW) (LHG), 2017 WL 3023211 (D.N.J. July 14, 2017)**

***McCarty v. Purdue Univ. Bd. of Trs.*, No. 4:13 CV 54, 2017 WL 2784413 (N.D. Ind. June 27, 2017)**

***Davidson v. Evergreen Park Cmty. High Sch. Dist. 231*, No. 15 C 0039, 2017 WL 2243096 (N.D. Ill. May 23, 2017)**

***Ennin v. CNH Indus. Am., LLC*, No. 1:15-cv-01359-RLY-MPB, 2017 WL 2225203 (S.D. Ind. May 22, 2017)**

***Rodriguez v. Akima Infrastructure Servs., LLC*, No. 16-cv-3607-PJH, 2017 WL 2214612 (N.D. Cal. May 19, 2017)**

***Williams v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, No. 3:16-CV-00098-NBB-JMV, 2017 WL 1957971 (N.D. Miss. May 10, 2017)**

***Troiano v. Cnty. of Allegheny*, No. CV 16-595, 2017 WL 1406901 (W.D. Pa. Apr. 20, 2017)**

***Johnson v. Jondy Chems., Inc.*, No. 3:16-CV-01734-MO, 2017 WL 1371271 (D. Or. Apr. 13, 2017)**

***Mayo v. St Mary's Med. Ctr., Inc.*, No. 16-0245, 2017 WL 1348514 (W. Va. Apr. 7, 2017)**

***Baker v. Goldberg Segalla LLP*, No. 16-CV-613-FPG, 2017 WL 1243040 (W.D.N.Y. April 5, 2017)**

***Smith v. Fla. Parishes Juvenile Justice Comm'n*, No. CV 15-6972, 2017 WL 1177905 (E.D. La. Mar. 30, 2017)**

***Molina v. Wells Fargo Bank, Nat'l Ass'n*, No. 2:16-cv-207-DN, 2017 WL 1184047 (D. Utah Mar. 29, 2017)**

***McKenzie v. Seneca Foods Corp.*, No. 16-CV-49-JDP, 2017 WL 1155966 (W.D. Wis. Mar. 27, 2017)**

***Gardner v. Summit Cnty. Educ. Serv. Ctr.*, No. 5:15CV1270, 2017 WL 979120 (N.D. Ohio Mar. 14, 2017)**

***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

***Hall-Dingle v. Geodis Wilson USA, Inc.*, No. CV 15-1868 (SRC), 2017 WL 899906 (D.N.J. Mar. 7, 2017)**

***Patterson v. AJ Servs. Joint Venture I, LLP*, No. CV 115-138, 2017 WL 830394 (S.D. Ga. Mar. 2, 2017)**

***West v. CSX Transp., Inc.*, No. 3:16-CV-02091, 2017 WL 77115 (M.D. Tenn. Jan. 9, 2017)**

B. Other Claims

***Gomez v. Haystax Tech., Inc.*, No. 1:16-CV-1433, __ F. Supp. 3d __, 2017 WL 5478179 (E.D. Va. Nov. 14, 2017)**

Employee, a program manager, sued her employer, a government contractor, for disability discrimination, FMLA retaliation, sex discrimination, and age discrimination. Employer filed a motion for summary judgment, which the district court granted.

Employer secured IT contracts with the government. It was forced to lay off employees when a contract required 20 fewer employees than anticipated. Employee was initially terminated. However, the termination was rescinded and she was permitted to continue work on a different contract. Employee subsequently took FMLA leave. Shortly after her return to work, employer learned it lost the contract under which employee was working. Employer ultimately terminated employee because it could not find her another position within the company.

Employee alleged employer terminated her in retaliation for taking FMLA. The court analyzed the claim pursuant to the *McDonnell Douglas* framework. While it held employee engaged in protected activity in taking FMLA leave, the court found employee could not establish pretext as the contract to which she was assigned had ended and employee could not be reassigned. The court was not persuaded by employee's comparator evidence.

***Gill v. Genpact, LLC*, No. 1:17-CV-454(LMB/JFA), 2017 WL 5319938 (E.D. Va. Nov. 13, 2017)**

Employee, a financial consultant, filed an eight-count lawsuit against his employer that included claims for FMLA interference and retaliation and violations of the ADA. The district court granted employer's motion for summary judgment on all claims.

Employee had a history of performance issues and employer planned to put him on a Performance Improvement Plan (PIP). Before employer could issue the PIP, employee requested FMLA leave. Employer issued the PIP upon employee's return. According to his supervisor, employee did not demonstrate improvement during the pendency of the PIP. Approximately one week before the expiration of the PIP, employee requested a number of accommodations under the ADA, including having less worry over about losing his job to reduce stress. Employer engaged employee in a discussion about the accommodations. It ultimately terminated his employment for failure to complete the PIP.

Employee alleged he was placed on a PIP, given a reduced bonus, and fired because of his disability and in retaliation for taking FMLA leave. The court applied a single analysis to the ADA and FMLA retaliation claims. It held employee's FMLA retaliation claim failed because employer decided to put him on a PIP before he requested leave. The court also concluded employee's failure to successfully complete the PIP prevented him from establishing the pretext prong of his retaliation claim.

In support of his FMLA interference claim, employee argued his termination denied him of his ability to take additional FMLA leave (i.e., he could not take leave once terminated). He also claimed his termination constituted both FMLA interference and FMLA retaliation. The

court rejected these claims, again noting that employer made the PIP decision before employee requested leave. The court rejected employee's argument that he could not be terminated after he notified his employer he May need FMLA leave in the future. It held the "better rule" was that an employee cannot obtain unqualified job protection by informing employer that he May take FMLA at some point in the future.

Summarized elsewhere:
***Bush v. Compass Grp. USA, Inc.*, 683 F. App'x 440 (6th Cir. 2017)**

***DeVoss v. Sw. Airlines Co.*, No. 3:16-CV-2277-D, 2017 WL 5256806 (N.D. Tex. Nov. 13, 2017)**

***Foruria v. Centerline Drivers, LLC*, No. 116CV00328EJLREB, 2017 WL 5492196 (D. Idaho Nov. 6, 2017)**

***Sartin v. Okla. Dep't of Human Servs.*, No. 15-CV-686-TCK-tlw, 2017 WL 3033130 (N.D. Okla. July 17, 2017)**

***Brown v. Excelda Mfg. Co., Inc.*, No. 15-CV-13349, 2017 WL 2351738 (E.D. Mich. May 31, 2017)**

***Blackett v. Whole Foods Mkt. Grp., Inc.*, No. 3:14-CV-01896 (JAM), 2017 WL 1138126 (D. Conn. Mar. 27, 2017)**

***Calaman v. Carlisle HMA, LLC*, No., 1:16-CV-116, 2017 WL 1105127 (M.D. Pa. Mar. 24, 2017)**

***Banner v. Wesley*, No. CV 14-691-LPS, 2017 WL 1033526 (D. Del. Mar. 17, 2017)**

1. Discrimination Based on Opposition

***U.S. ex rel. Lott v. Not-For-Profit Hosp. Corp.*, No. 16-CV-1546 (APM), __ F. Supp. 3d __, 2017 WL 5186344 (D.D.C. Nov. 8, 2017)**

Former Chief of Compliance Officer alleged that employer terminated him for identifying and reporting violations of state and federal laws, including an FMLA retaliation claim. Employee had previously alerted employer that the firing of another employee who was out on FMLA leave could run afoul of the FMLA. The court declined to decide whether employee's reporting of wrongdoing , a fulfillment of his job responsibilities, constituted protected activity under the FMLA. According to the court, employee's single expression that employer's action of firing another employee who was out on FMLA leave did not constitute oppositional conduct. The court concluded that employee failed to state a plausible claim of retaliation under the FMLA.

***Lenoir v. SGS N. Am., Inc.*, No. 1:16-CV-58-SA-DAS, 2017 WL 4158625 (N.D. Miss. Sept. 18, 2017)**

Employee, a switchman, filed charges with the Equal Employment Opportunity Commission and received a right-to-sue letter. Next, employee brought suit for retaliation for taking FMLA leave. Employer, a contractor for a chemical plant, requested summary judgment.

The court denied employer's motion for summary judgment. The court found that there were numerous disputed material facts that precluded a summary judgment determination. The court reasoned that employee's reliance on the close temporal proximity between his FMLA leave and his termination was probative to prove his claim. In particular, employer refused to allow employee to work on light duties, threatened to replace employee, and made negative comments on the length of employee's FMLA leave.

***Reganato v. Appliance Replacement Inc.*, No. CV 15-6164 (RMB/JS), 2017 WL 747463 (D.N.J. Feb. 27, 2017)**

Employee worked in a hybrid payroll/human resources position in which she was partially responsible for making sure that employer's health insurance plan premiums were paid. Employee claimed that she twice protested the termination of two co-workers who were on FMLA leave, with one of these alleged protests coming just two weeks before her termination. Employee also claimed that after protesting the terminations, her ability to work through her lunch, work overtime, and her bonus was reduced. Employer terminated employee because it determined she had forgotten to see that its health insurance plan premiums were paid, and the policy lapsed, leaving employees without coverage.

The district court granted employer's motion for summary judgment finding that employee had presented virtually no evidence to support her claims. Employee had failed to present evidence other than her own testimony, and the fact that her termination occurred two weeks after her second alleged protest, to support her key allegations, and presented no evidence that employer treated other employees differently. In addition, the court rejected employee's claim that pretext was shown by discharging her for failing to pay the health insurance bill, instead of giving her less severe discipline given that she had worked for employer for ten years.

Summarized elsewhere:
***King v. Mestek, Inc.*, No. 3:15-cv-30071-MAP, __ F. Supp. 3d __, 2017 WL 4125253 (D. Mass. Sept. 18, 2017)**

***Mejia v. Roma Cleaning, Inc.*, No. 15-cv-4353 (SJF) (GRB), 2017 WL 4233035 (E.D.N.Y. Sept. 25, 2017)**

***Coleman v. Bank of America, N.A.*, No. 3:16-CV-1439-G, 2017 WL 3334104 (N.D. Tex. Aug. 4, 2017)**

2. Discrimination Based on Participation

***Mourning v. Ternes Packaging Ind., Inc.*, 868 F.3d 568 (7th Cir. 2017)**

Employee brought suit under the FMLA challenging her termination on the basis that it was retaliation for taking FMLA leave. The district court granted summary judgment in favor of employer and employee appealed. The Seventh Circuit affirmed the judgment. Employee reported to the general manager of the company, which provided supply chain management services. The general manager, in turn, reported to the director of sales of employer's parent company. In February 2013, employee requested FMLA leave, which was approved by the general manager. In March 2013, while employee was still on leave, several employees supervised by employee complained to the general manager about employee, alleging that she intimidated and publicly humiliated them. The parent company initiated an investigation and

concluded that employee had exhibited unprofessional conduct and also failed to satisfy customer expectations. The parent company then fired employee.

The district court granted employer's motion for summary judgment on the basis that employee failed to make a *prima facie* showing that she was meeting performance expectations at the time she was fired and she could not identify a similarly situated employee who did not request FMLA leave. The Seventh Circuit affirmed, concluding that employee could not identify anyone who she believed had an issue with her taking FMLA leave or any evidence that employer or the parent company retaliated against her for taking leave.

***Mistler v. Worthington Armstrong Venture (WAVE)*, 697 F. App'x 201 (4th Cir. 2017)**

Employee brought suit under the FMLA for retaliation in connection with his termination. Employee was employed at employer's manufacturing facility. Employer had a policy for leaving early that required an employee to give verbal notice and receive approval from a supervisor. In 2011, employee requested intermittent FMLA leave for shoulder pain, which was granted. Employee had been granted permission to leave early 43 times pursuant to the FMLA. On all but one of these 43 occasions, employee clocked out when he left early. In September 2013, employee left early after experiencing pain, but failed to give verbal notice or receive approval from his supervisor. Instead, he left a note on his supervisor's desk. His supervisor was also out on leave at the time. When employee's absence was noticed, employer searched for employee – who had not clocked out when he left – and found employee's car was gone and the note left on the desk.

Employer brought a motion for summary judgment on the basis that employee was terminated for his failure to give verbal notice and receive approval for his leave. Employer also argued that employee had requested and been granted FMLA leave many times before and there had never been an issue. The district court agreed with employer, and concluded that there was no evidence to suggest employee's termination was in retaliation for exercising FMLA rights, but was for his absence without verbal notice and approval. The district court granted summary judgment. On appeal, the Fourth Circuit affirmed.

***Lindstrom v. Bingham Cnty.*, No. 1:17-CV-019-DCN, 2017 WL 3659165 (D. Idaho Aug. 23, 2017)**

Employee sued his former employer for violation of the FMLA when he was laid off from his job after taking FMLA leave. Upon the conclusion of his FMLA leave, employee was placed in a different position than the one he had when he started leave. Employee claimed the position was not equivalent in that the work was too physically demanding, and he could not return to work in that position. Eventually he was laid off. Employer filed a motion to dismiss employee's FMLA claims based on its assertion that it was undisputed that employee could not perform an essential function of his prior job on or before the date his FMLA leave expired. The court denied the motion. The court agreed that if employee could not perform an essential function of his job at the time his FMLA leave ended, he lost his FMLA rights to reinstatement. However, the court concluded that, reading employee's allegations broadly and granting inferences in his favor, the question of whether he could perform those essential job functions was in dispute.

Chevalier v. Metro Utils. Dist**., 900 N.W.2d 565 (Neb. App. 2017)**

Employee, who had applied for a promotion to a supervisory position at Metropolitan Utilities District of Omaha ("MUD"), brought suit against MUD for retaliating against her for taking intermittent leave under the FMLA. Employee sought a directed verdict with the Nebraska state trial court, which the trial court overruled. After a jury verdict in favor of MUD, the trial court entered judgment for MUD. On appeal, employee maintained that the trial court erred by denying her motion for directed verdict. Specifically, she contended that a directed verdict was proper because she presented uncontroverted evidence that her time on leave due to complications with Lyme disease was improperly considered as a basis for employer's decision not to award her the promotion.

The appellate court affirmed the lower court's overruling of the directed verdict. First, the appellate court determined that employee was not qualified for leave under the FMLA because she had not applied for such leave on the basis of a serious health condition.

With respect to employee's causal connection argument, the appellate court also affirmed the lower court's overruling of the directed verdict. The appellate court reasoned that employer's decision to deny employee the promotion was not an act of retaliation linked to her FMLA leave. In making its employment decision, employer relied on employee's absence record provided by the human resources department. The record did not indicate that employee's absences were due to her Lyme disease or were FMLA-related. Rather, the absences were simply marked as sick days. For this reason, the appellate court found that the evidence did not indisputably show that employer's decision to deny employee the promotion was because of leave taken under the FMLA.

Summarized elsewhere:
Charles v. Air Enters., LLC**, 244 F. Supp. 3d 657 (N.D. Ohio 2017)**

Kercher v. Reading Muhlenberg Career & Tech. Ctr.**, No. 5-6674, 2017 WL 3917630 (E.D. Pa. Sept. 6, 2017)**

Tarpley v. City Colls. of Chi.**, No. 14 C 6712, 2017 WL 3600571 (N.D. Ill. Aug. 22, 2017)**

Dallefeld v. The Clubs at River City, Inc.**, No. 1:15-cv-01244-JES-JEH, 2017 WL 3013241 (C.D. Ill. July 14, 2017)**

Davidson v. Evergreen Park Cmty. High Sch. Dist. 231**, No. 15 C 0039, 2017 WL 2243096 (N.D. Ill. May 23, 2017)**

Cronk v. Dolgencorp, LLC**, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)**

III. Analytical Frameworks

White v. Burlington N. Santa Fe R.R. Co**., No. C15-5145 RBL, 2017 WL 750112 (W.D. Wash. Feb. 27, 2017)**

Employee, Darrell White, worked as a carman for employer, Burlington Northern Santa Fe Railroad ("BNSF"). Employee claims he was retaliated against in violation of the Family Medical Leave Act ("FMLA"). White applied for and began using doctor-approved FMLA

leave in 2007 for chronic right-shoulder pain. In March 2010, White's supervisor accused him of fraudulent FMLA use. White denied the allegation and a heated discussion ensued, after which BNSF began closely monitoring employee's attendance. Employee reported the false accusation and time sheet scrutiny to the employee hotline. Employer investigated employee's claim but failed to contact him directly or visit his work site. Employer found no wrongdoing and continued scrutinizing employee's attendance. Employee claims that employer retaliated against him by refusing to rehire him for opposing BNSF's harassment.

Employee successfully established a *prima facie* case of retaliation. Furthermore, it is a material question of fact as to whether employee's hotline calls were protected opposition activities. Legitimately questioning an employee's FMLA use is not an unlawful FMLA practice. However, the evidence supports employee's claim that employer's investigation was harassment since there was no evidence of actual FMLA abuse.

***White v. Winn-Dixie Montgomery, LLC*, No. 2:14-CV-01702-RDP, 2017 WL 529298 (N.D. Ala. Feb. 9, 2017)**

Employee, a grocery store manager, had ongoing performance issues throughout his employment. In particular, employee was cited for two incidents in which he failed to address customer service issues and an incident in which he falsely claimed that the butcher area was properly closed, but was not. On or about November 3, 2013, employee was placed on a performance improvement plan ("PIP") as a result of his performance issues. On November 16, 2013, employer instituted a termination corrective action against employee. Employee remained employed while his charge of discrimination was being investigated. On December 19, 2013, employee took leave. Employee filed for extended leave under the Family Medical Leave Act ("FMLA") on December 23, 2013. Employee received the company's FMLA packet on the same day. Employee returned his medical certification and FMLA request on January 1, 2014. He was informed that it would take five to seven business days to process his request. Thereafter, employee returned to work and was terminated during a meeting with his supervisors on January 4, 2013.

Employee alleges claims for interference and retaliation under the FMLA. The FMLA creates two types of claims: (1) interference claims, in which an employee asserts that his employer denied or otherwise interfered with his substantive rights under the FMLA; and (2) retaliation claims, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the FMLA. In order to state a claim for FMLA interference, "a plaintiff need only demonstrate that he was entitled to but denied a substantive FMLA right." Employer's motives are irrelevant. However, the right to commence FMLA leave is not absolute and an employee can be dismissed preventing him from exercising his right to commence the FMLA leave, without thereby violating the FMLA, if employee would have been dismissed regardless of any request for FMLA leave. Thus, the question is why was employee terminated. If there is no retaliatory motive, the termination is lawful because an employee who requested FMLA leave, if then discharged from work, and who would have been otherwise been discharged, cannot claim FMLA interference. Consequently, the two FMLA claims essentially merge into one claim.

In the present case, employee's supervisors both attested that they began discussions regarding employee's termination in late October 2013 due to increasing concerns about his performance. Employee's supervisors began preparing the termination documents on

November 3, 2013. Therefore, employer met its burden of articulating a legitimate business reason for employee's termination. Employee also failed to demonstrate causation based solely on the temporal proximity of his termination and application for FMLA leave.

Wright v. Parker-Hannifin Corp., No. 6:16-CV-00044, 2017 WL 1318576 (W.D. Va. Jan. 19, 2017)

Employee, Lisa Wright, filed a claim against her former employer, Parker-Hannifin Corporation. Employees alleges that she was retaliated against after seeking leave under the Family and Medical Leave Act ("FMLA"). Employee alleges that her supervisor refused to accept her legitimate medical excuses. Employee also contends that she was terminated from her job, but reinstated two hours later and faced increased harassment and was subject to wrongful disciplinary write-ups after seeking leave under the FMLA. Employer, Parker-Hannifin Corp., filed a motion to dismiss. Employer contends that employee failed to adequately plead her claims.

To state a claim for FMLA retaliation, an employee must plausibly allege: (1) that she engaged in protected activity; (2) that employer took adverse action against her; and (3) that the adverse action was casually connected employee's protected activity. In this case the protected activity alleged in the complaint is taking of FMLA leave due to injuries suffered after a fall at work. The complaint also includes adverse action by claiming that employee was harassed and threatened to be terminated. Furthermore, employee alleges that the harassment occurred because of employee's medical treatment. Thus, employee has set forth a sufficient claim to survive a motion to dismiss.

A. Substantive Rights Cases

Acker v. Gen. Motors LLC, 853 F.3d 784 (5th Cir. 2017)

Employee was approved for intermittent FMLA leave, but on several occasions was absent from work and did not follow company protocol for requesting FMLA leave. Employee was issued a disciplinary suspension on those occasions and subsequently sued, alleging that the suspensions constituted interference and retaliation under the FMLA. Employer moved for summary judgment, which the district court granted. The district court's order was affirmed on appeal. On appeal, employee did not seriously dispute (with uncontradicted evidence) that he failed to timely report the FMLA absences in question as required by the collectively bargained attendance policy; rather, he argued that he gave "reasonable" notice of his absences which should have been enough. The court deemed such an argument misplaced under the regulations that went into effect in 2009. Those regulations, the court explained, explicitly allow employers to condition FMLA leave on following employer's call-in policy. The court also affirmed summary judgment on employee's retaliation claim finding that employee had not shown how his disciplinary leave was caused by his attempts to seek FMLA protections instead of his failure to follow the attendance and absence approval process. In reaching this conclusion, the court pointed out the record evidence that employee had taken more than 30 days of intermittent leave by following the call-in procedure. In addition, employer provided employee several opportunities to correct his attendance issues when it could have terminated employee's employment under the attendance rules prior to actually proceeding to the termination level.

***Quigley v. Meritus Health, Inc.*, No. CV CCB-14-2227, 2017 WL 412492 (D. Md. Jan. 31, 2017)**

Employee filed suit in the district court through which she claimed that employer interfered with her rights under the FMLA. The matter was before the court on a bench trial. Employee worked as an ultrasound technician for employer, a hospital. Employee was the only ultrasound technician who had a steady shift. While employee was on FMLA leave, employer changed her schedule such that employee would have a rotating shift like the other technicians. Employee objected and did not return to work from leave. The rotating shift schedule was discussed with the technicians as a group before employee started her leave. However, did not attend the meeting. The court also found that employer discussed the possibility of a rotating schedule directly with employee three months before employee started her leave. The court focused on the fifth prong of factors to establish an interference claim; "the employer denied her benefits to which she was entitled." Typically, an employee is entitled to reinstatement to the same shift she enjoyed before starting the leave, unless that shift has been eliminated or changed for reasons unrelated to the leave. The court did not establish whether employer or employee had the burden of proof as to the right to reinstatement. The court determined that no such determination was necessary because: (1) the change in shift schedule was decided before employee gave notice of her desire for leave; (2) the change was based on legitimate reasons; and (3) although the change impacted employee most of all, each technician was impacted to some degree and changes impacting only one employee are not unlawful *per se*.

Summarized elsewhere:
***Duane v. IXL Learning, Inc.*, No. C 17-00078 WHA, 2017 WL 2021358 (N.D. Cal. May 12, 2017)**

***White v. Burlington N. Santa Fe R.R. Co.*, No. C15-5145 RBL, 2017 WL 750112 (W.D. Wash. Feb. 27, 2017)**

***White v. Winn-Dixie Montgomery, LLC*, No. 2:14-CV-01702-RDP, 2017 WL 529298 (N.D. Ala. Feb. 9, 2017)**

***Wright v. Parker-Hannifin Corp.*, No. 6:16-CV-00044, 2017 WL 1318576 (W.D. Va. Jan. 19, 2017)**

1. General

Summarized elsewhere:
***White v. Burlington N. Santa Fe R.R. Co.*, No. C15-5145 RBL, 2017 WL 750112 (W.D. Wash. Feb. 27, 2017)**

***White v. Winn-Dixie Montgomery, LLC*, No. 2:14-CV-01702-RDP, 2017 WL 529298 (N.D. Ala. Feb. 9, 2017)**

***Wright v. Parker-Hannifin Corp.*, No. 6:16-CV-00044, 2017 WL 1318576 (W.D. Va. Jan. 19, 2017)**

2. No Greater Rights Cases

***Aguirre v. The State of Cal.*, No. 16-CV-05564-HSG, 2017 WL 5495953 (N.D. Cal. Nov. 16, 2017)**

Employee worked as an Employment Program Representative for the Employment Development Department, a California agency, for more than 30 years. Defendant Carianne Huss was Employee's direct supervisor. Employee stated that "as a practical matter" she "primarily reported" to Defendant Debra Mills. In the fall of 2015, employee interviewed for, and was promoted to, the position of Employment Development Specialist I, a position that would require her to report to employer's office in Marysville, which was 100 miles away from employee's home in Lakeport. On March 17, 2016, employee requested FMLA leave to care for her ailing father and further requested the accommodation of temporarily working out of the Lakeport office, so she could take her father to his morning medical appointments. On May 6, 2016, while on FMLA leave, employee emailed Huss, Mill, and Janet Netizel (Mills' supervisor) to discuss her options of remaining in Lakeport to continue to take care of her father. Mills told employee that she was "no longer able to accommodate [her] in the Lakeport office" but presented her with several alternatives that could potentially accommodate her needs. Employee filed a complaint against employer for interfering with her FMLA rights, and both she and employer filed motions for summary judgment.

The court stated that the threshold question was whether Mills and Huss could be held individually liable as employers under the FMLA. The court said "the plain language of the statute states that the term 'employer' includes both 'any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer' and 'any "public agency."' 29 U.S.C. § 2611(4)(A)(ii)-(iii)." The court ruled that the FMLA permits individual liability for public agency supervisors. Regarding employee's interference claim, the court said employer had not interfered with employee's FMLA rights by requiring that she work in Maryville, because the Maryville requirement preceded her FMLA leave. "'The Ninth Circuit has made clear…that '[t]he FMLA does not entitle the employee to any rights, benefits, or positions they would not have been entitled to had they not taken leave.' *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1132 (9th Cir. 2001)." The court also said employee was not automatically entitled to protections under the FMLA when she met with her supervisors in May to discuss her options of remaining in Lakeport. This was because she never actually requested additional FMLA leave. "[T]he Ninth Circuit has declined to hold that an employee's mere reference to 'an FMLA qualifying reason triggers FMLA protections,' because doing so 'would place employers...in an untenable situation if the employee's stated desire is *not* to take FMLA leave.' *See Escriba v. Foster Poultry Farms*, 743 F.3d 1236, 1244 (original emphasis)." The court denied employee's motion for summary judgment and granted employer's motion for summary judgment in part and denied it in part. This was because the court felt there was a genuine dispute of material fact as to whether employee's supervisors discouraged her from seeking additional leave. The court said employee's interference claim narrowly survived summary judgment because of Mill's statement to her that Mills was "no longer able to accommodate [her] in the Lakeport office."

***Jackson v. BNSF Ry. Co.*, No. 4:16-CV-695-A, 2017 WL 3263131 (N.D. Tex. July 28, 2017)**

Employee was a marketing manager in employer's Fort Worth office. Among employee's responsibilities were establishing the pricing to ship her assigned commodities on the

railroad. Initially employee was responsible for two commodities. Employee struggled with the volume of work, and employer placed her on a performance improvement plan ("PIP"). Employee did not receive the PIP well. On May 3, 2016, employee experienced a breakdown. She went to a doctor and then sent an email to her supervisor saying she was "not well to return back to work." Her insurer, MetLife, would forward documentation so she could take short-term disability. On May 9, employee attended a Beyoncé concert in employer's suite at AT&T Stadium. Another employee who saw her there questioned employer about her attendance, saying he thought she was out sick. Employee's attendance at the concert raised a red flag with employer. Employer, who believed employee was out on leave to avoid her PIP, informed employee she wished to speak with her, but employee was uncooperative. On May 16, employer told employee she needed to talk to her by the close of business that day, and that employee could be terminated by failing to communicate with employer. Employee did not respond. By letter dated May 18, employee was terminated for poor work performance. From the time employee took leave, employer did not know why employee was on leave. Employee sued employer for FMLA interference and retaliation. Employer moved for summary judgment.

Employee alleged that employer interfered with the exercise of her FMLA rights by terminating her employment shortly into her FMLA leave. The court stated an employee who takes leave under the FMLA is not entitled to greater rights than she would be entitled to if she had not taken FMLA leave. An otherwise proper termination precludes entitlement to leave. Employer suspected employee of committing fraud (claiming a benefit to which she was not entitled) and, when employer tried to investigate, employee would not cooperate, so employer terminated her. Once employee was properly terminated, she was no longer eligible for FMLA benefits, so employer could not have interfered with her FMLA rights. Employee alleged that employer retaliated against her for the exercise of her rights under the FMLA by terminating her after she availed herself of those rights. The court said that even if employer was incorrect in its assessment of employee's behavior, that assessment constituted a legitimate, non-discriminatory reason for terminating employee. Employee did not present evidence showing that employer's reason was pretextual. The court granted employer's motion for summary judgment.

Summarized elsewhere:
***Charles v. Air Enters., LLC*, 244 F. Supp. 3d 657 (N.D. Ohio 2017)**

***Millen v. Oxford Bank*, No. 2:16-cv-12230, 2017 WL 4811571 (E.D. Mich. Oct. 25, 2017)**

***Quigley v. Meritus Health, Inc.*, No. CV CCB-14-2227, 2017 WL 412492 (D. Md. Jan. 31, 2017)**

B. Proscriptive Rights Cases

***Blackburn v. Genuine Parts Co.*, No. 16 C 06911, 2017 WL 1316265 (N.D. Ill. Apr. 10, 2017)**

Employee worked for employer for almost 14 years. In his last 4 years of employment he went on three different leaves of absence. His last leave of absence was counted as leave under the FMLA. Employee was discharged two days after his FMLA leave expired. Employee filed suit alleging, in part, that employer interfered with his rights under the FMLA by refusing to reinstate him at the conclusion of his leave. The court denied employer's motion to dismiss employee's FMLA interference claim, reasoning that the issue was not whether employer provided employee the full 12-week allotment of leave under the FMLA, but whether the

employer terminated employee's employment because he exercised his right to take FMLA leave. The court held that the employee had sufficiently plead a claim under the latter theory.

Summarized elsewhere:
<u>*Alejandro v. N.Y. City Dep't of Educ.*, No. 15-CV-3346 (AJN), 2017 WL 1215756 (S.D.N.Y. Mar. 31, 2017)</u>

IV. Application of Traditional Discrimination Framework

<u>*Long v. Endocrine Soc'y*, 263 F. Supp. 3d 275 (D.D.C. 2017)</u>

Employee, a publications marketing manager, brought claims of retaliation and interference under the FMLA against employer. Employee claimed that employer's decision to terminate her employment while she was on FMLA leave, taking care of her mother, interfered with her right to take FMLA leave and was in retaliation for her taking approved leave. The United States District Court for the District of Columbia granted employer's motion for summary judgment on both claims.

Between 2013 and 2014 employee's work performance declined to a point where her supervisors met with her on multiple occasions to discuss her lackluster performance, and raised the possibility of termination. Throughout 2014, employee's parents experienced serious health problems. After employee's father passed away in late September 2014, she took 24 days of FMLA leave to care for her mother. Employee took two additional days of leave in mid-December 2014, also to care for her mother. On December 22, 2014 employee requested, and was approved for, 12 weeks of FMLA leave. During her leave, employer discovered she had been using her work email account for unauthorized activities, in violation of company policy. On January 8, 2015, employer terminated employee due to concerns about her poor work performance and unauthorized use of company resources.

Employee alleged a "single motive" retaliation claim, or alternatively, a "mixed motive claim." Under the "single motive" theory, employee alleged employer fired her for taking FMLA leave, and under the "mixed motive" theory, she alleged that her taking FMLA leave was an impermissible factor in the termination of her employment. Employee went on to make a series of allegations, none of which persuaded the court.

First, employee argued that employer firing her while she was on leave evidenced retaliation. The court found that without more, temporal proximity between taking FMLA leave and termination was insufficient to outweigh an employer's legitimate non-discriminatory explanation. Second, employee argued that alleged inconsistencies in employer's reasons for termination established pretext and retaliatory intent. Employee offered a lone, stale positive performance review and testimony from two coworkers to rebut employer's claim that she performed poorly at work. The court, however, was not persuaded, finding that the stale employment review and testimony about employee's competency from coworkers without firsthand knowledge of her performance did not establish inconsistencies. Similarly, the court found that employee's argument that there was no policy prohibiting her from using her laptop for personal use failed to cast doubt on her being terminated for unauthorized use of company resources. Third, employee argued that employer treated similarly situated employees more favorably than her. The court also rejected this argument, finding that she did not identify any other employees that could be used as comparators.

Fourth, employee argued employer's stated reasons for termination were pretextual because employer did not use progressive discipline in terminating her. The court, however, found that employer's failure to use progressive discipline did not establish pretext because the policy noted that an employer could start the process at any step, and contrary to employee's assertions, employer actually used a form of progressive discipline. Finally, employee argued that statements made by her immediate supervisor in emails and deposition testimony established pretext. The court also rejected this argument finding that statements made by someone who was disconnected from the decision to terminate could not establish a retaliatory motive. After rejecting each of employee's arguments, the court concluded that no reasonable jury could conclude employer retaliated against employee for taking FMLA leave and granted summary judgment for employer on employee's retaliation claim.

Similarly, the court granted summary judgment for employer on employee's interference claim. Although the D.C. Circuit had not addressed which party bears the burden of proving interference when an employee is denied the right to return to the same or equivalent position as when the employee's leave began, the court declined to address the issue. Noting employer's dissatisfaction with employee's performance, efforts taken to address her deficiencies, and employee's misuse of employer's resources, the court found that regardless of which party had the burden of proof, there was no factual dispute as to whether employee would have been fired if she had not taken FMLA leave. The court further noted that even assuming employer had the burden of showing a legitimate reason to deny employee's reinstatement, no reasonable jury could conclude on the facts of the case that employee's termination interfered with her right to take FMLA leave.

***Tarrant v. Hamilton Twp. Sch. Dist.*, No. 16-7058 (FLW) (LHG), 2017 WL 3023211 (D.N.J. July 14, 2017)**

Employee Joanne E. Tarrant, a Spanish teacher, brought NJ FLA and FMLA claims for retaliation and interference against her former employer, Hamilton Township School District, and the Hamilton Township Board of Education after employers informed her she would not be rehired for the following school year and subsequently failed to hire her for other positions. Employers moved to dismiss employee's retaliation claim because she failed to allege her exercise of NJ FLA/FMLA leave caused her termination and caused employers to hire less qualified applicants over her. They further asserted that employee failed to allege NJ FLA and FMLA interference because she failed to allege that employers denied her benefits or that employers' failure to provide FMLA notices caused her any prejudice.

The court determined employee had sufficiently alleged claims for NJ FLA and FMLA retaliation. She alleged employers told her and other Spanish teachers before she requested FMLA leave that she would not lose her employment as a result of the Elementary Spanish Program being eliminated. Shortly after beginning her FMLA leave she received a letter from employers stating she would not be rehired. She alleged she then applied for positions for which she was qualified but less-qualified applicants were hired in her stead.

The court also determined she failed to allege claims for NJ FLA and FMLA interference. Employee alleged that employers approved her request for leave and failed to allege that she was actually denied any FMLA benefits. She therefore failed to allege that employers denied her benefits or that employers' failure to provide FMLA notices caused her any prejudice.

***Tognozzi v. Mastercard Int'l Inc.*, No. 4:16 CV 2045 CDP, 2017 WL 2225207 (E.D. Mo. May 22, 2017)**

Employee was vice president for employer Mastercard International Incorporated until her termination and alleges her supervisor, employer Mary Griffin ("Employer Griffin"), gave preferential treatment to employee's male counterpart, interfered with her right to take FMLA leave, and ultimately terminated for discriminatory reasons in January 2015. She also brought claims of sex and disability discrimination and retaliation under the American with Disabilities Act, the Missouri Human Rights Act, the Family Medical Leave Act, and Title VII. Employer argued that employee's FMLA claim should be dismissed as the case was barred by the 2 year statute of limitations. Employers also moved to dismiss on the grounds employee failed to allege facts to show she was discrimination against on the basis of her gender or in retaliation for complaints of sex discrimination. Employer Griffin moved to dismiss the ADA and Title VII claims against her as they cannot be brought against individual supervisor and the court granted the motion on these grounds.

The court held employee's claims (besides the claims against Employer Griffin) were pleaded sufficiently and denied the motion to dismiss. Employee presented several examples of Employer Griffin giving preferential treatment to employee's male counterpart. Further, employee presented evidence of a surgery and discussion with Employer Griffin wherein she discouraged employee from taking FMLA leave. Employee did not take FMLA leave because she feared retaliation from Employer Griffin. Employee took three months of FMLA leave and when she returned to work on January 5, 2015, employers termination her employment.

With respect to employee's claim for interference and retaliation under the Family Medical Leave Act, the court held Employer Griffin demonstrated reckless disregard for whether her conduct was prohibited. As someone who had previously had surgery while employed, Employer Griffin would have likely known of employee's rights under the FMLA. Based thereon, the allegations in the complaint are sufficient to invoke the three-year statute of limitations in U.S.C. § 2617(c)(2) for a willful violation. With respect to the sex discrimination claim, employee articulated a plethora of examples regarding increased work load and responsibilities while decreasing the male counterparts. After employee's surgery, the demands of her job caused health problems and she was forced to take leave. Finally, employee set forth sufficient facts that she had consistently received positive reviews and feedback about her performance yet was terminated.

***Alcozar-Murphy v. ASARCO Ariz. Inc.*, No. CV-14-2390-TUCDCB, 2017 WL 748626 (D. Ariz. Feb. 27, 2017)**

Employee, a commercial haul truck driver, alleged, *inter alia*, that employer retaliated against her for her use of FMLA leave by terminating her employment. Employee requested FMLA leave in order to recover from an eye condition, and was immediately returned to her position at the same rate of pay upon certification that she was able to return to work. Employee was terminated several weeks later for attempting to modify employer's payroll system without authorization. Employer moved for summary judgment on, *inter alia*, employee's FMLA retaliation claim.

The district court granted the motion for summary judgment as to the FMLA retaliation claim, finding that employee had not demonstrated by a preponderance of the evidence that her

use of FMLA protected leave had constituted a negative factor in employer's decision to terminate her. The court focused in particular on the fact that the decision to terminate employee had been made after she had been returned to work in the same position and with the same rate of pay as she had enjoyed prior to her FMLA leave.

Summarized elsewhere:
***Vincent v. Coll. of the Mainland*, 703 F. App'x 233 (5th Cir. 2017)**

***Cordova v State of N.M.*, No. 16-CV-1144-JAP-JHR, __ F. Supp. 3d __, 2017 WL 4480748 (D.N.M. Oct. 6, 2017)**

***Tuhey v. Ill. Tool Works, Inc.*, No. 17 C 3313, 2017 WL 3278941 (N.D. Ill. Aug. 2, 2017)**

***Singleton v. Pilgrim's Pride Corp.*, No. 3:15-4999-JFA, 2017 WL 2952970 (D.S.C. July 11, 2017)**

A. Direct Evidence

***Ward v. Ingersoll-Rand Co.*, 688 F. App'x 104 (3d Cir. 2017)**

Employee brought a retaliation claim under the FMLA. Employee alleged he was targeted by his employers for taking a seven-week medical leave following an injury employee sustained on the job. The district court granted employer's motion to dismiss, and employee appealed. Employee argued that the district court should have applied the direct-discrimination standard instead of the *McDonnell Douglas* approach. In addition, employee insisted that his former supervisor's testimony was direct evidence because the testimony asserted that employer instructed the supervisor to "keep a close eye" on employee when he returned from medical leave. Furthermore, employee claimed that the warning notices he received upon his return to work from medical leave were pretextual. The court rejected employee's assertions that the testimony from employee's former supervisor was not direct evidence, distinguishing direct evidence from circumstantial evidence as evidence that demonstrates employers placed a substantial negative reliance on the employee's protected activity. The court further explained that the testimony was insufficient to establish that employee was targeted *because* of his workers' compensation claim and medical leave. In addition, the court found that that the warning notice employee received upon his return from medical leave was insufficient to establish pretext because employee had accumulated similar infractions prior to his medical leave. Thus, the court affirmed the district court's *McDonnell Douglas* approach and held employer's proffered reasons for disciplining the employee were not pretextual.

***Smith v. Concentra, Inc.*, 240 F. Supp. 3d 778 (N.D. Ill. 2017)**

Employee was employed as a Front Office Specialist by Concentra Health Services, Inc. ("the employer"). On September 8, 2014, employee was injured in a car accident and injured her spine, left wrist, and hand. When she returned to work on September 15, 2014, she reported that she had no work restrictions. Yet, employee indicated that she did not want to do drug screens for patients because they entailed unscrewing caps which was difficult due to the brace which she wore on her left wrist. Employee subsequently presented a note from her doctor indicating that she could not use her left hand. Employer instructed employee to take FMLA leave because she was in pain while working. Employee wanted to keep working and asked for an

accommodation performing work that did not require her to twist her left hand. Employer did not make an accommodation.

Employee also requested FMLA leave. She was approved for only one month of leave. Employee made several attempts to telephone her employer who had been instructed by legal counsel not to speak with employee. Employer sent employee a letter stating that if employee did not contact her employer by November 24 she would be considered to have voluntarily resigned her employment. Employee claimed that she did not receive that letter. On December 1, having not heard from employee, employer terminated employee's employment. Employee filed suit in the Northern District of Illinois, claiming retaliation for exercising her FMLA rights.

Employee alleged that the company violated her FMLA rights because they terminated her while she was on FMLA leave. The court viewed her claim as one alleging retaliation. The court did not distinguish between direct and indirect evidence but considered the evidence as a whole. The court held that employee failed to offer any evidence sufficient to link her termination to her FMLA status and that she was terminated because she failed to return to work or to respond to her employer's communications after her FMLA leave expired. The court stated that even if employee did not receive employer's letter instructing her to contact it or else, the letter evinces a plausible motive for her termination, one not grounded in retaliation or discrimination.

***Turner v. N.J. State Police*, No. 08-5163 (KM) (JBC), 2017 WL 1190917 (D.N.J. Mar. 29, 2017)**

Employee brought suit under 29 U.S.C. § 2601 alleging interference and retaliation. The district court in New Jersey granted employer's motion for summary judgment on both issues. Employee failed to allege and submit any proof showing he was denied FMLA leave to which he was entitled. Furthermore, employee's retaliation claim failed because of lack of evidence in the record. Employee failed to show any elements of retaliation under the FMLA. The complaint alleged that a counseling session was adverse employment action; however, a counseling session did not meet the standard of materially altering the terms or conditions of his employment.

***Ross v. Prof'l Bureau of Collections of Md., Inc.*, No. 16-v-01550-KLM, 2017 WL 1242997 (D. Colo. Mar. 17, 2017)**

Employee brought suit under 29 U.S.C. § 2601 alleging interference and retaliation. The district court in Colorado granted employer's motion to dismiss on both counts based on lack of evidence. Employee failed to show any evidence of interference with FMLA leave. Additionally, employee failed to show any specific act of retaliation based on taking FMLA leave. Although the district court granted the motion to dismiss, the court dismissed the claim without prejudice with leave to amend the complaint.

***Stewart v. Wells Fargo Bank Nat'l Ass'n*, No. 5:15-CV-00988-MHH, 2017 WL 977412 (N.D. Ala. Mar. 14, 2017)**

Employee represented the estate of his mother, an employee of defendant Wells Fargo Bank, who brought a retaliation claim against her employer when she was terminated after returning from approved FMLA leave. Employee was hired in March 2012 as a sales consultant for employer and had decades of industry experience. At the end of 2012, she received "met expectations" on an overall performance evaluation. In April 2013, employee received an

informal warning for her underperformance in meeting sales goals. In June 2013, she received a formal warning. One week after receiving a formal warning, employee visited her doctor for treatment of chronic neck pain and was diagnosed with myelopathy. On July 8, 2013, employee received a poor mid-year performance review.

The next day, employee submitted a request for medical leave for neck surgery, which was granted. Employee returned to work on August 23, 2013. On October 2, 2013, her supervisor sent an e-mail to human resources and his supervisor recommending employee's termination. The supervisor cited performance-based reasons and then stated that termination was justified because employee submitted a request for medical leave. Employee subsequently was terminated "for continued poor performance."

The district court of Alabama denied employer's motion for summary judgment on the basis that employee provided direct evidence of retaliation: the "blatant remark" that employee should be terminated because she requested medical leave. Employer argued that it was entitled to summary judgment because it terminated employee for poor performance. However, the district court rejected employer's reason for termination. "[T]he burden of persuasion does not shift to [employer] to 'rebut this type of showing of [retaliation] simply by articulating or producing evidence of legitimate, nondiscriminatory reasons' for terminating [the employee]."

Summarized elsewhere:
***Chavez v. Colo. Dep't of Educ.*, 244 F. Supp. 3d 1106 (D. Colo. 2017)**

***Jackson v. La. Dep't of Pub. Safety & Corrs.*, No. 15-00490-JJB-RLB, 2017 WL 2786493 (M.D. La. June 27, 2017)**

***Preeson v. Parkview Med. Ctr., Inc.*, No. 15-cv-02263-MSK-KMT, 2017 WL 1197298 (D. Colo. Mar. 30, 2017)**

B. Application of *McDonnell Douglas* to FMLA Claims

***Caplan v. L BrandsVictoria's Secret Stores*, 704 F. App'x 152 (3d Cir. 2017)**

Employee brought suit for claims of retaliation and interference under the FMLA. The district court granted employer Victoria's Secret's motion for summary judgment and employee appealed. Employee argued that employer interfered with her FMLA rights by failing to notify employee of her FMLA leave eligibility. The court rejected employee's argument, finding that employee was aware of her rights under the FMLA because she had previously taken FMLA leave while working for employer.

Employee also argued that employer retaliated against her by firing her for taking FMLA leave. The court rejected this argument and held that evidence of temporal proximity alone from when the employee invoked her right to take leave to the adverse action is insufficient to demonstrate a causal link unless it is unusually suggestive of retaliatory motive. The court reasoned that there was no evidence that employer knew of employee's medical conditions or leaves of absence when it made the decision to terminate her.

***Brister v. Mich Bell Tel.*, 705 F. App’x 356 (6th Cir. 2017)**

The district court granted summary judgment in favor of employer in the action for retaliation in violation of the FMLA and the Michigan Persons with Disabilities Civil rights act. Employee appealed and the Sixth Circuit reviewed *de novo* the district court’s grant of summary judgment. Employee alleged that he was pressured to target employees who used FMLA or disability leave and directed to terminate them or force them to resign. She alleged that when she refused to target those employees she was retaliated.

The district court’s approach was to identify whether employee established that her opposition to the directive to target FMLA users was a causal factor in her alleged constructive discharge by using direct evidence or circumstantial evidence evaluated under the *McDonnell Douglas* burden-shifting framework.

Whereas precedent applied the *McDonnell Douglas* burden-shifting framework to the retaliation claim under the FMLA, the Sixth Circuit held that employee bears the burden of proving that she was constructively discharged regardless of whether she had presented direct evidence or circumstantial evidence. The court held that employee must show that (1) employer deliberately created intolerable working conditions as a reasonable person would perceive them to be and (2) employer did so with the intent to force employer to resign. Furthermore, the court established a list of non-exclusive factors to determine the existence of a constructive discharge. After analyzing these factors, the court found that employee could only claim one factor and thus failed to show constructive discharge. Therefore, the court affirmed.

***Hartman v. Lafourche Parish Hosp.*, 262 F. Supp. 3d 391 (E.D. La. 2017)**

Employee worked as a medical staff coordinator for employer. In August 2015, employee took eight weeks of FMLA leave to undergo a major surgical procedure. In November 2015, she requested additional FMLA leave to care for her husband who had been diagnosed with cancer and renal failure. Employee’s supervisor initially denied this request, mistakenly believing employee could not take FMLA leave for two different qualifying events in the same year. However, she allowed employee to work a flexible schedule. In February 2016, employee again requested FMLA leave to care for her husband as he underwent a stem cell transplant. This request was granted, and employee took leave from February 2016 to April 2016. Employee was terminated immediately upon her return. Employer cited mistakes in paperwork and poor performance as the reasons for employee’s termination. Employee filed an action against employer, including claims of FMLA interference and retaliation. Employer filed a motion for summary judgment.

In her claim of FMLA interference, employee referenced her second request for FMLA leave to care for her ailing husband, which employer denied. Employer said this claim should fail, because employee could not demonstrate prejudice on the part of employer. Employee contended that she suffered prejudice because, despite allowing her a flexible schedule, employer piled work on employee right before she intended to leave to bring her husband to the doctor and then “wrote up” employee for passing her work off to a coworker. The court denied employer’s motion for summary judgment on employee’s interference claim, due to genuine issues of material fact.

In her claim of FMLA retaliation, employee pointed to the temporal proximity between her return from leave and termination. The court stated that under the *McDonnell Douglas* burden-shifting framework, if an employee establishes a *prima facie* case of retaliation, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for its employment decision. Then the employee must show that employer's reason is pretextual. Employer stated that even before employee took her first FMLA leave, she was coached for making errors in the paperwork. During her second leave, a coworker, who took over her duties, identified that she was still making numerous errors. Supervisor decided to terminate employee but waited till she returned from leave so she would not lose her FMLA benefits. Employee's version of events varied wildly. Employee alleged employer had not followed hospital policy in terminating her, employer gave her good performance reviews till she began to take FMLA leave, and employer treated her less favorably than other employees who made more serious mistakes than she. Employer submitted an army of arguments disputing employee's assertions of pretext. The court said that in doing this, employer just created more genuine issues of material fact. Employer's motion for summary judgment on employee's retaliation claim was denied.

***McIntosh v. White Horse Vill., Inc.*, 249 F. Supp. 3d 796 (E.D. Pa. 2017)**

Employee began her employment with employer in September 2010 as a "pool employee," meaning employee only worked when employer needed a substitute nurse. Later that year, employee began working as a full-time licensed practical nurse ("LPN") – as a full-time LPN, employee was guaranteed 32 hours per week. Full-time LPNs were expected to work on Sunday; however, employee requested and received an accommodation to attend religious services on Sundays. In May 2014, employee took approved FMLA leave to undergo surgery. When employee returned to work on August 6, 2014, she began reporting to a new Director of Nursing, who allegedly informed employee of a new policy requiring LPNs to work every other weekend. Sometime after the new policy went into effect, employee's status changed from full-time employee to pool employee. Thereafter, employee filed a multi-count complaint alleging violations of several anti-discrimination statutes, including claims for FMLA interference and retaliation.

The court granted employer's motion for summary judgment on employee's FMLA claim(s). In addressing the *prima facie* requirements of employee's FMLA retaliation claim, the court held that employee failed to set forth evidence of a causal connection between her FMLA leave and her change in employment status. In reaching this conclusion, the court noted two factors relevant to their analysis of whether a causal connection existed between the adverse employment decision and the FMLA leave: (1) a showing that the two events were close in time or (2) evidence of ongoing antagonism toward employee. Moreover, to succeed on an FMLA interference claim, employee must establish that she was eligible for FMLA leave, she was entitled to FMLA leave, and she was denied benefits to which she was entitled under the FMLA. The court reasoned that employee could not meet her *prima facie* burden because the undisputed facts established that employee requested and was granted FMLA leave.

***Nekich v. Wis. Cent. Ltd.*, No. 16-CV-2399 (JNE/DTS), 2017 WL 5591600 (D. Minn. Nov. 17, 2017)**

Employee, a rail traffic controller, brought suit against his former employer, a railroad company, under the FMLA, ADA, and ADEA in connection with his suspension and ultimate

termination. He asserted FMLA claims under the theories of (1) entitlement, (2) discrimination, and (3) retaliation. Employer moved for summary judgment, which the district court granted-in-part and denied-in-part. The district court denied the motion as to employee's entitlement claim. Employee contended that he was entitled to FMLA leave on January 1, 2015, but did not notify employer of his intent to take FMLA leave until January 2, 2015. Thus, employer argued that employee failed to provide timely or adequate notice of his intent to take FMLA leave. The court disagreed, determining that employee's notice was timely under 29 C.F.R. §§ 825.302(b) and 303(a), under which an employee must provide notice to employer "as soon as practicable" when leave is not foreseeable, which can include the same day leave is needed "or the next business day." As to the adequacy of employee's notice, the district court held that employee "likely provided adequate notice," but determined that the issue presented a genuine issue of material fact.

Applying the *McDonnell Douglas* burden shifting framework, the court granted summary judgment in favor of employer as to the discrimination claim. The parties agreed that employee (1) engaged in a protected activity and (2) suffered an adverse employment action when he was terminated; however, employer argued that there was no causal connection between the protected activity and the adverse action, and that employee could not establish pretext. Although the court found that the temporal proximity between the protected activity and the adverse action was "very close," and therefore, under Eighth Circuit precedent, established a causal connection, the court found no evidence of pretext. Specifically, the court rejected employee's argument that the investigation surrounding his suspension was a sham. Finally, employee did not contest employer's motion as to his FMLA retaliation claim, therefore, the court granted the motion as to the retaliation claim without discussion.

***Walpool v. Frymaster LLC*, No. CV 17-0558, 2017 WL 5505396 (W.D. La. Nov. 16, 2017)**

Employee, a welder, sued his former employer, a manufacturer, alleging that employer interfered with his substantive rights under the FMLA and terminated him in retaliation for exercising his right to FMLA leave. Employee requested intermittent FMLA leave. Employer initially approved the request, but terminated employee's employment four days later. Employee sought damages for past and future lost salary, emotional distress damages, and costs, including attorneys' fees. Employer moved to dismiss employee's claims. The court granted-in-part and denied-in-part employer's motion. First, the court denied employer's motion to dismiss employee's FMLA interference claim. Employer argued that employee failed to provide proper notice of his intention to take leave on a specific date. The court determined that employee's complaint met the "low" burden of providing proper notice because employee requested intermittent leave in writing and in compliance with employer's policies.

Second, the court denied employer's motion as to employee's FMLA retaliation claim. Under the *McDonnell Douglas* burden shifting framework, employer argued that employee failed to state a claim because he failed to allege that he "opposed any practice made unlawful." The court found that this argument relied on a "literal interpretation" of 29 U.S.C. § 2615(a)(2) that was not supported by Fifth Circuit precedent. The court concluded that merely requesting FMLA leave constitutes a protected activity under the FMLA. Finally, the court granted employer's motion to dismiss as to employee's claim for emotional distress damages because such damages, as well as punitive damages, are not available under the FMLA.

***Coleman v. Parallon Enters. Inc.*, No. 3-13-CV-0021, 2017 WL 4349161 (M.D. Tenn. Sept. 29, 2017)**

Employee alleged a retaliation claim under the FMLA. Employer moved for summary judgment. The court found that employee could not establish facts from which a jury could find that the asserted reason for her termination was pretext. Employee had a "well-established" history of attendance problems. Further, she was granted FMLA leaves on numerous occasions and was allowed to modify her work schedule multiple times to address attendance issues. Also, immediately prior to her termination, employee had received a final written warning that she would be subject to termination for further violation, and had another incident following the final written warning. Finally, the court found that none of the comparators claimed by employee had attendance issues comparable to hers. The court granted employer's motion for summary judgment as to employee's FMLA claim.

***Stewart v. Physicians Support Servs., Inc.*, No. 14-CV-195-JED-FHM, 2017 WL 4274711 (N.D. Okla. Sept. 26, 2017)**

Employee, who was employed as a service representative with Physicians Support Services, took FMLA leave in July 2012 to have knee surgery, returning to work in August 2012. She continued to take intermittent leave for physical therapy throughout September and October of that year. Employee was issued a written warning in November 2012 as a result of what her supervisor concluded was rude, disrespectful, unprofessional and other inappropriate conduct. Additional incidents of improper conduct followed, resulting in employee's discharge in early December 2012. Employee then filed suit claiming, among other things, that employer interfered with her right to take FMLA and retaliatorily discharged her, both in violation of the FMLA.

As to her retaliation claim, the court concluded that because of the temporal proximity between employee's taking of leave (ending in early November 2012) and her discharge, she arguably had established her *prima facie* case. However, employer had produced substantial evidence demonstrating that employee's manager believed that employee had acted in an unprofessional manner, disrespecting her co-workers and causing disruption in the workplace. In response, employee asserted only that employer had failed to follow its disciplinary policy because it did not go through every step of the progressive policy. Noting that the policy expressly provided that one or more steps of the policy May be omitted depending on the nature of the conduct, the court concluded that this was not sufficient evidence of pretext and dismissed the retaliation claim. As to the interference claim, the court noted that there was no evidence that employer had ever refused time off to employee or otherwise prevented her from taking FMLA leave. On the contrary, the evidence demonstrated that employer expressly advised employee that while she should not unilaterally adjust her work schedule, she would be allowed time off if needed for medical appointments. Thus, the court likewise dismissed the interference claim.

***Skibitcky v. Healthbridge Mgmt., LLC*, No. 3:16-cv-00052-VLB, 2017 WL 4127899 (D. Conn. Sept. 18, 2017)**

Employee was hired as a part-time Recreational Therapist in 2009. In the spring of 2013, employer issued her a verbal warning for failing to timely complete and communicate the agenda related to an assigned program. In August 2013, employee received an "Education" after expressing a lack of confidence in her ability to leading the assigned program and, that same

month, was disciplined for insubordination based on a verbal encounter with her supervisor. Employee requested intermittent leave both for a high blood pressure condition exacerbated by stress and to attend a psychiatric therapy program. In an email to a human resources representative following a meeting with the representative to discuss her leave request, employee asserted that her supervisor, Nathalie Mihalchick, was a "trigger" for her high blood pressure. Employer approved her leave request and accommodated her by adjusting her work schedule during the duration of the therapy program. Employee returned to her regular work schedule following completion of the program. In January 2014, employee was issued a final written warning and an unpaid suspension stemming from a verbal altercation between employee and a co-worker a couple of weeks earlier. Approximately two months later, a resident reported that employee had not read to her (an assigned duty) despite claiming having done so on her daily activity report. Mihalchick then reviewed other activity reports and discovered that employee had claimed to have met with five patients who in fact already had been discharged. Employee was suspended again pending further investigation. Upon request, employee faxed a response to the allegations to the Administrator (Mihalchick's boss), which did not deny the allegations, suggesting instead that perhaps the residents were discharged later in the day after she met with them. Employee later admitted that the Administrator's findings were accurate with respect to at least three of the previously-discharged residents. Based on this information, the Administrator terminated employee's employment. Employee then filed suit against employer, asserting interference and retaliation claims under the FMLA. She subsequently abandoned her interference claim.

As to her retaliation claim, the district court concluded that employee could not establish a *prima facie* case, given the lack of temporal proximity (discharge occurring seven months after the initial FMLA leave request and four months after the last leave taken) and the "intervening causal event[s]," namely, the undisputed performance issues that led to employee's multiple disciplinary actions prior to her discharge. Assuming that she could establish her *prima facie* case, added the court, she could not demonstrate pretext in the legitimate, non-discriminatory reasons asserted by employer for her discharge. Employee claimed that pretext existed because she disputed the reasons for her discharge but the court rejected that argument, noting that merely quarreling with the reason(s) for or wisdom of employer's discharge decision is insufficient, absent facts controverting the reasoning for the decision. Moreover, employee, in fact, did not dispute, and in some cases admitted to, the conduct for which she was discharged. Accordingly, summary judgment was warranted on the retaliation claim.

***Dearden v. GlaxoSmithKline LLC*, No. 15 Civ. 7628, 2017 WL 4084049 (S.D.N.Y. Sept. 14, 2017)**

Employee, a pharmaceutical sales representative, filed an action alleging retaliation and discrimination claims under both the FMLA and New York's Human Rights Law. Employers moved for summary judgment on all claims. The district court found that employee was not able to demonstrate a *prima facie* case of unlawful retaliation under the FMLA using the burden-shifting framework laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and dismissed the case.

Specifically, the district court found that many of the actions complained of by employee, including rude emails, micromanagement and general complaints, did not rise to the level of adverse action. Moreover, the district court found that employee could not establish a causal nexus between the FMLA leave taken and the termination. The court found that the four months

between employee's return from FMLA leave and the termination did not support an inference of causation and that there was a legitimate intervening basis for employer to undertake an investigation of employee. The district court also considered employee's claims of disparate treatment, but found that none of the comparators were similarly situated. Finally, although the district court found that employee could not establish a *prima facie* case, it held that the reasons put forward by employer for employee's termination were non-retaliatory and that there was no evidence of pretext.

***Zalenski v. Wilkes-Barre Hosp. Co., LLC*, No. 3:15-CV-2428, 2017 WL 3929320 (M.D. Pa. Aug. 21, 2017)**

Employee, a nurse, brought both FMLA interference and retaliation claims against employer after she was terminated. Employer maintained that it terminated employee because of a work history marked by an extraordinarily high number of workplace violations and a pattern of deficient conduct, capped off by an April 2014 incident where she violated employer's patient identification protocol and received several patient complaints. Employee argued employer fired her because she was going to need time off for neck and wrist surgeries.

Initially, the court concluded employee's claim for interference was improper as it related to her termination. Under the FMLA, claims based on the event of termination are construed as claims of retaliation and not interference. Employee made no claim that her FMLA rights were violated or that employer ever interfered with her FMLA rights during her employment. As such, her interference claim was improperly brought, and the court restricted its consideration of employee's FMLA claims to retaliation.

The court then granted employer's motion for summary judgment on employee's retaliation claim. The court found that employee did not engage in protected activity merely by vaguely suggesting at some point in the future she might need surgery. The court also found no causal connection between any alleged protected activity and employer's decision to terminate employee. There was no evidence to show that the decision-maker was aware that employee had engaged in any protected activity, that she had impending surgeries, or that she would need to take time off of work. As such, a causal connection could not exist between the alleged protected activity and the adverse employment action. Finally, the court found employer had a legitimate reason for terminating employee – her work history of disciplinary actions – and employee did not offer sufficient evidence of pretext.

***Stanley v. Delaware N. Cos.*, No. A-16-CV-834 LY, 2017 WL 3485078 (W.D. Tex. Aug. 14, 2017)**

Employee worked as a cocktail server at an international airport and sued employers, Delaware North Companies Travel Hospitality Services and Brazos Concessions Company. Employee brought suit under the FMLA alleging she was fired in retaliation for taking intermittent FMLA leave as a result of a struggle with ulcerative colitis. Employee spoke with someone from Human Resources who informed her of the option to take intermittent FLMA leave but warned her during that conversation that she must comply with employers' call in procedures while utilizing her intermittent leave. In the few months that followed, employee missed up to twenty days of work, nine of which employer asserted were no-call, no-shows. Employee was put on suspension for her unapproved absences and was formally terminated shortly thereafter.

A Texas District Court denied both employee's motion for summary judgment and employers' cross-motion for summary judgment. The court determined there was a genuine issue of material fact as to whether employee was terminated for failure to follow call-in procedures and not due to her FMLA-protected absences. The court cited a 5th Circuit case stating, "[A]n employer generally does not violate the FMLA if it terminates an employee for failing to comply with a policy requiring notices of absences, even if the absences that the employee failed to report were protected by the FMLA." However, because there was a dispute as to the legitimacy of employers' proffered reason, summary judgment was improper for either side.

***Brown v. Excelda Mfg. Co., Inc.*, No. 15-CV-13349, 2017 WL 2351738 (E.D. Mich. May 31, 2017)**

Employee sued a manufacturing business, claiming that it terminated her employment in retaliation for having taken a leave under the FMLA. Employee was a long term employee who worked from December 1998 to May 2015 as a production associate. During the course of her employment, she requested and received FMLA leave on three separate occasions: (1) in 2001 for the birth of her son, (2) in 2008, intermittent leave to take care of her mother, and (3) from July 29, 2014 to May 2015, intermittent leave (a total of 14 days) for her own serious health condition (severe menstrual cramping). Employee admitted that she was reinstated each time to the same position and she was not disciplined for the leaves of absence. In addition, during the course of her employment, she requested and the company requested time off for personal reasons. Over the course of her employment employee had attendance issues unrelated to her FMLA leaves of absence – she received 19 warnings for violating employer's Attendance Policy. She also had behavior issues at work for which she was disciplined. Ultimately, the company terminated employee for leaving work early without permission and other attendance issues.

The court granted employer's motion for summary judgment after applying the *McDonnell Douglas* burden-shifting framework. The court held that employee failed to establish a *prima facie* case of FMLA retaliation because she failed to show a causal connection between the protected FMLA activity and the termination. Employee attempted to show causation through two main pieces of evidence (1) disparate treatment ("treating people differently from 'others' based on a prohibited classification") between herself and the co-worker that gave her rides and (2) temporal proximity between the last FMLA intermittent leave in 2014-2015 and a write up she received. As to disparate treatment, the court held that employee and the co-worker were not similarly situated: (1) employee and the co-worker reported to different supervisors, worked in different departments, and had different attendance obligations, (2) there was no evidence in the records that the co-worker did not need to leave work early because of his reliance upon a co-worker for transportation, and (3) there was no evidence in the record that the co-worker had been disrespectful towards a supervisor by yelling and barging out of the room. On a side note, the court held that the cat's paw theory did not apply because the supervisor who reported the issues to upper management who made the termination decision (1) did not intend to cause an adverse employment action and (2) employee relied on speculation when she asserted that that the supervisor harbored anti-FMLA animus. As to temporal proximity, the district court held that the a written warning does not constitute an adverse employment action and therefore there cannot be temporal proximity between a protected activity and a warning. Also, even if a written warning constitutes an adverse employment action, employee failed to allege that the warning was the subject of her FMLA retaliation claim.

Lastly, the court held that even if employee established a *prima facie* case, employee failed to show that that employer's legitimate, non-discriminatory reason for her firing her was a pretext. The court noted that there was evidence that employer did not harbor anti-FMLA bias and moreover employer had accommodated employee with many leaves of absence.

***Marrin v. Capital Health Sys., Inc.*, No. 14-2558 (FLW) (LHG), 2017 WL 2369910 (D.N.J. May 31, 2017)**

Employee, a medical laboratory technician terminated from her employment with a medical center, sued her employer alleging interference with FMLA rights and retaliation. Employee had been working for employer for seven years and had received a number of written warnings when a new lab director started in late 2012. She had also requested and taken several periods of approved intermittent FMLA leave. Employee received two additional written warnings in early 2013, including a final written warning for violating employer's call-out policy for unplanned absences.

Employee met with a human resources representative in mid-February, 2013, and complained regarding these disciplinary actions and other personnel issues. In the course of investigating employee's complaint, the human resources representative asked employee to provide any relevant documents. Employee requested and was approved for FMLA leave in late February, 2013 and remained on leave continuously until late March, 2013. The human resources representative held another meeting with employee in mid-March, during her FMLA leave, and employee presented confidential e-mails sent among the lab manager, director, and supervisor. When the human resources representative asked employee how she obtained the documents, she stated they were given to her anonymously. This prompted an investigation into how employee obtained the e-mails, which unearthed facts causing employer to believe employee had removed the e-mails from the lab supervisor's office file cabinet without her knowledge. When employee returned from leave, she was interviewed two additional times regarding the confidential e-mails and gave conflicting answers in one interview and refused to answer the question in the other. Nine days after employee returned from leave, she was notified that she was being terminated for failure to cooperate during an ongoing investigation.

The district court granted summary judgment for employer, and the court of appeal affirmed. With respect to employee's interference claim, the court held that employee failed to establish a *prima facie* case, because she had admitted she never was denied a requested FMLA leave. She also admitted employers had fully complied with all work restrictions imposed by her doctors after her leave. Therefore, the court held, employee could not assert a claim for FMLA interference as a matter of law.

The court then applied the *McDonnell Douglas* burden-shifting analysis to employee's retaliation claim and found that the close temporal proximity between employee's termination her complaints to human resources (17 days) and her return from FMLA leave (9 days) were sufficient to make a *prima facie* showing that a causal connection existed between employee's protected activity and her termination. However, the court also found that employer's proffered reason for termination – employee's failure to cooperate in an ongoing investigation and her history of disciplinary actions – were sufficient to shift the burden to employee to demonstrate the proffered reason was pretextual. The court held employee failed to make this showing for several reasons. Employee did not deny that she failed to explain how she obtained the

confidential documents and offered no evidence to rebut employer's assertion that she had taken the documents from her supervisor's office and refused to cooperate in the investigation.

The court also considered whether the temporal proximity of the termination to employee's complaint and her FMLA leave, alone, could suffice to demonstrate pretext. The court noted that the discovery of employee's possession of the confidential documents did not occur until employee was on FMLA leave. Therefore, the court held, this case fell outside the narrow set of circumstances that May justify finding pretext on the basis of timing alone, such as where a long-standing disciplinary issue exists with no action by employer to address it, and employee is only actually disciplined for the conduct after requesting or taking FMLA leave.

***Cannon v. Univ. of Tenn.*, No. 3:15-CV-576, 2017 WL 2189565 (E.D. Tenn. May 17, 2017)**

Employee sued his public entity employer (the University of Tennessee at Knoxville) for, among other things, retaliation and interference of his rights under the FMLA. The district court granted summary judgment for the public entity employer. Employee was a Service Aide (a physically demanding job) in the Department of Building Services, which provides professional cleaning services to various campuses.

In the years leading up to his termination, employer contended that employee had job performance issues and attendance problems unrelated to FMLA leaves of absence and employee, for which employee was disciplined and placed on a performance improvement plan. Employer also contended that employee exhausted his FMLA leave entitlement months before his termination and that after exhaustion of his FMLA leave entitlement, employee never again worked enough hours to be again eligible for FMLA.

As to the retaliation claim under the FMLA, the court held that employee failed to establish a *prima facie* case because employee failed to show a causal connection between the termination and protective activity. While employee pointed to some performance reviews criticizing his attendance as evidence of retaliatory intent, the court held that such criticism was directed to non-FMLA protected absences. Moreover, he received all of his FMLA leave entitlement. Even assuming that the criticism of his attendance in his performance review related to his FMLA absences, the temporal proximity was too long (more than six months).

As to the interference claim under the FMLA, the court again applied the *McDonnell Douglas* burden shifting framework. Again, employee failed to show a *prima facie* case. The court held that employee failed to show that he again qualified for FMLA leave after he initially exhausted all of his leave entitlement.

***Preeson v. Parkview Med. Ctr., Inc.*, No. 15-cv-02263-MSK-KMT, 2017 WL 1197298 (D. Colo. Mar. 30, 2017)**

Employee worked for employer as a financial counselor/eligibility specialist from October 2008 through December 2014. Throughout her employment, employee was plagued with health issues, which caused employee to take leaves of absence from work, all of which were approved by employer and generally designated as FMLA leave. In October 2013, just two days after employee return to work from approved FMLA leave, employee's supervisor, Ms. Harrison presented employee with a list showing her absences over the last year – employee' absences and tardy arrivals exceeded the number permitted under employer's attendance policy, Ms. Harrison informed employee that if she could not justify each absence, employee would be

discharged. Employee explained that some of the absences were related to medical issues covered by FMLA and no further disciplinary actions were taken.

On or around December 17, 2014, employee was placed on administrative leave after being confronted by Ms. Harrison and a member of HR about her delay in meeting with a patient. During the meeting, they informed employee that clocking in, then taking items out of her car and moving her car while on the clock constituted the prohibited act of leaving the premises during working hours. In response, employee explained that employees leaving the building during working hours to run errands or to move their cars were well-known practices, approved by Ms. Caldera, employee's direct supervisor, and other employees who engaged in this conduct were not disciplined. Subsequently, employer discharged employee for falsification of time.

Employee brought suit alleging violations of the ADA and the FMLA, namely, interference with her FMLA rights arising from several different events and FMLA retaliation claims based on her non-election for the supervisor position and her subsequent discharge. Employee's interference claim asserts that she was subjected to four adverse actions relating to her leave: (1) Ms. Harrison – her indirect supervisor –"harassed" her about her attendance when she returned from her October 2013 leave; (2) she was denied a position as Administrator; (3) she was excluded from a training course; and (4) she was not given the supervisor position in employer's Financial Counseling Department – the unit that employee's 2013 grant proposal created and a position that employer's executives had previously suggested employee should receive.

In assessing employee's FMLA interference claim, the court noted that an FMLA interference claim is unlike a retaliation claim, in that employer's motivation is irrelevant in the interference context. The court rejected employee's argument that an interference claim can lie when an employer takes an adverse employment action long after employee returns from FMLA leave, reasoning that interference claims must have some direct nexus to an employee requesting, using, or returning from leave. The court concluded that all but employee's claims that Ms. Harrison threatened to fire her for absenteeism immediately upon employee's return from FMLA leave in October 2013 fail to articulate a cognizable interference claim. The court reasoned that to succeed on an FMLA interference claim, employee must only show that her employer provided a strong disincentive or discouraged use of available FMLA leave, such that would cause her to fear invoking her rights under the FMLA. In granting summary judgment to employer, the court found that despite Ms. Harrison's threat to discharge employee for attendance policy violations, employee continued to exercise her FMLA rights and shortly thereafter applied for and was granted FMLA leave.

Employee based her FMLA retaliation claim on four different "adverse actions": (1) she was denied the title of Administrator in November 2013; (2) she was excluded from a training course in December 2013; (3) she was not selected for the supervisor position that was given to Ms. Caldera; and (4) she was discharged. In assessing what constitutes adverse action, the court stated that adverse action is not limited to actions that affect the terms and conditions of employment" or monetary losses; rather, an employment action is sufficiently adverse for purposes of a retaliation claim if a reasonable employee would have found it materially adverse or, employee would be dissuaded from engaging in protected conduct. The court found that neither the denial of the title of "Administrator" nor employee's exclusion from a training course constituted adverse employment actions. However, the court noted, and employer agreed, that

employee established a *prima facie* case of retaliation based on employer's failure to promote employee and her subsequent discharge. To refute employee's *prima facie* case, employer contends that it selected Ms. Caldera for promotion rather than employee because Ms. Caldera had better comments about her abilities from persons who worked with her, and discharged employee for falsification of time records. The court denied employer's motion for summary judgment on employee's retaliation claims, holding that a reasonable fact finder could conclude that the facially non-retaliatory reasons given for failing to promote and subsequently discharging employee were a mere pretext for discrimination. In reaching this conclusion, the court noted that there was evidence that Ms. Harrison targeted employee after she took FMLA leave and testimony that Ms. Harrison regarded employee's FMLA requests as "a bunch of baloney." Additionally, employee provided sufficient evidence that employees left work, while on the clock, to move their cars or run errands and were neither disciplined nor discharged.

<u>*Popko v. Penn State Milton S. Hershey Med. Ctr.*, No. 1:13-CV-1845, 2017 WL 1078158 (M.D. Pa. Mar. 22, 2017)</u>

Employee began employment at the Penn State Milton S. Hershey Medical Center in 1973 and worked there, primarily as a Manager of Supply and Distribution, till December 2011. In February 2011, employee signed and dated a Disciplinary Letter given to him by a medical center administrator, acknowledging that he had engaged in sexual harassment of an employee in his group. In March 2011, employee signed and dated a health care certification form in support of his request for FMLA leave, after which he took two months of FMLA leave. In November 2011, he made an off-color remark about his daughter's bra at a business meeting. In December 2011, he resigned from the medical center in lieu of termination.

Employee filed a complaint against employer, alleging that employer had interfered with his right to take FMLA leave and retaliated against him for seeking FMLA leave. Employee claimed that, following his return from FMLA leave, there had been a pattern of antagonism against him. Employer filed a motion for summary judgment.

The court had previously found in its Memorandum on Defendants' Motion to Dismiss that no temporal proximity existed with respect to employee's FMLA leave in Spring and termination in December. But it allowed employee's retaliation claim to proceed on his theory of a pattern of antagonism.

During its session on employer's motion for summary judgment, the court applied the *McDonnell Douglas* framework, where employee has the burden of establishing a *prima facie* case of retaliation, after which the burden shifts to employer to articulate a legitimate, nondiscriminatory reason for termination. If the employer articulates a legitimate, nondiscriminatory reason, the burden shifts back to employee to prove employer's reason was pretextual. The court stated that even if employee could meet his *prima facie* burden, employer would still be entitled to summary judgment, having produced significant evidence of employee's unprofessional conduct in the workplace. But employee had failed to meet his *prima facie* burden. His proof of a pattern of antagonism, which included some policy reversals and a disagreement about wash basins, was not deemed by the court to reflect antagonistic behavior at all but rather "operational differences of opinion" within employee's unit. Nor had employee provided any facts whatsoever showing that employer's reason for asking him to resign was pretextual. Employer's motion for summary judgment was granted.

***Parniske v. Mich. Bell Tel. Co.*, No. 15-CV-12040, 2017 WL 747597 (E.D. Mich. Feb. 27, 2017)**

Employees are 12 former employees who provided customer support to dissatisfied customers and claim that they were either constructively discharged or terminated for taking FMLA leave. Employer telephone company filed a motion for summary judgment on employees' claims for FLMA retaliation. At various times, employees took FMLA leave for a variety of reasons, all of which were unrelated to each other. The United States District Court for the Eastern District of Michigan analyzed each claim separately and granted summary judgment to employer on five of the twelve FMLA claims.

Several of employer's management-level employees testified that two successive general managers implemented practices to "work [FMLA users] out of the business." Evidence demonstrated that managers consistently gave directives to target FMLA users. Despite this evidence, the court refused to analyze all of the claims together and refused to account for the "totality of the circumstances."

The court granted summary judgment on the five claims where employees were terminated for legitimate, non-discriminatory reasons of attendance violations that were not related to employees' FMLA leaves. Because employees were unable to establish pretext, these five claims were discharged.

***Clarke v. Nw. Respiratory Servs.*, LLC, No. A16-0620, 2017 WL 393890 (Minn. App. Jan. 30, 2017)**

Employee brought suit against his former employer, a respiratory services company, alleging retaliation under the FMLA. As a services technician, employee delivered equipment to customers and educated customers on proper use and care of the equipment. Employer had granted FMLA to employee from December 31, 2013 to March 4, 2014 to attend inpatient treated to treat his posttraumatic stress disorder. Employer terminated employee's employment on March 28, 2014 based on numerous complaints (made prior to, during, and after the FMLA leave) about employee's driving and employee's rude behavior toward customers.

The Minnesota Court of Appeals affirmed the district court's decision granting summary judgment for employer. The court analyzed the claim under the *McDonnell Douglas* framework, finding that a statement by employee's supervisor that employee's "recent time off" was a reason for his termination, by itself, was not sufficient evidence to fulfill the direct evidence method of proving his claims, where the vice president actually made the decision to terminate employee's employment. Under the *McDonnell Douglas* framework, the court first found that employee had presented a *prima facie* case of FMLA retaliation, finding that the timing of the termination and the supervisor's statement constituted sufficient evidence of a causal connection between employee's protected activity and the adverse action. Second, the court found that employer articulated a legitimate, nondiscriminatory reason for terminating employee in stating that employee was terminated because employer received a complaint the day before the termination that he provided poor customer service and was rude, causing a customer to discontinue using employer's services. Finally, the court found that employee failed to show that employer's nondiscriminatory reason was pretextual. The court noted that the supervisor's statement provided some weak evidence of discriminatory motive. However, employee still failed to make a showing of pretext given that employer had presented issues of employee's work performance,

employee failed to present evidence that employer treated other similarly situated employees more favorably, and employee had received two complaints shortly before his termination, including one from a customer who terminated employer's services. The court also specifically analyzed and rejected each of employee's arguments in his attempt to show that employer's stated reason was pretext. Employee argued the following circumstances demonstrated pretext: (1) he produced evidence calling into question the significance of the last customer complaint; (2) he was treated less favorably than other employees involved in events relating to that complaint; (3) he was treated less favorably than other service technicians who engaged in comparable or more serious conduct; and (4) employer deviated from its policies in terminating him.

Summarized elsewhere:
***Kelly v. Univ. of Pa. Health Sys.*, No. 16-3303, __ F. App'x __, 2017 WL 3980524 (3d Cir. Sept. 11, 2017)**

***Vincent v. Coll. of the Mainland*, 703 F. App'x 233 (5th Cir. 2017)**

***Gomez v. Haystax Tech., Inc.*, No. 1:16-CV-1433, __ F. Supp. 3d __, 2017 WL 5478179 (E.D. Va. Nov. 14, 2017)**

***Bartos v. PDC Energy, Inc.*, No. 1:16-CV-167, __ F. Supp. 3d __, 2017 WL 3224457 (N.D. W.Va. July 28, 2017)**

***DeCicco v. Mid-Atl. Healthcare, LLC*, No. 14-2933, __ F. Supp. 3d __, 2017 WL 3189034 (E.D. Pa. July 27, 2017)**

***Bailey v. Quest Diagnostics, Inc.*, No. 1:17-CV-625, 2017 WL 6524950 (E.D. Va. Dec. 19, 2017)**

***Diamond v. Am. Fam. Mut. Ins. Co.*, No. 4:16-00977-CV-RK, 2017 WL 5195881 (W.D. Mo. Nov. 9, 2017)**

***Peterson v. WHB Transp., LLC*, No. CIV-15-878-D, 2017 WL 4106077 (W.D. Okla. Sept. 15, 2017)**

***Coleman v. Caterpillar, Inc.*, No. 1:15-cv-01001-SLD-JEH, 2017 WL 3840423 (C.D. Ill. Sept. 1, 2017)**

***Thompson v. Kessler Inst. for Rehab., Inc.*, No. 15-5533, 2017 WL 3784036 (D.N.J. Aug. 31, 2017)**

***Reagan v. Centre LifeLink Emergency Med. Servs., Inc.*, No. 4:15-CV-1390, 2017 WL 3601982 (M.D. Pa. Aug. 22, 2017)**

***Tuhey v. Ill. Tool Works, Inc.*, No. 17 C 3313, 2017 WL 3278941 (N.D. Ill. Aug. 2, 2017)**

***Tarrant v. Hamilton Twp. Sch. Dist.*, No. 16-7058 (FLW) (LHG), 2017 WL 3023211 (D.N.J. July 14, 2017)**

***Singleton v. Pilgrim's Pride Corp.*, No. 3:15-4999-JFA, 2017 WL 2952970 (D.S.C. July 11, 2017)**

1. *Prima Facie* Case

***Offor v. Mercy Med. Ctr.*, 676 F. App'x 51 (2d Cir. 2017)**

A neonatologist claimed that the hospital terminated her in retaliation for taking FMLA leave, among other claims. The district court agreed, but the Second Circuit Court of Appeals vacated the judgment for FMLA retaliation and remanded it to the trial court for further proceedings.

Due to employer's denial of employee's request for moonlighting hours and vacation time, employee hired an attorney. A month later, employer placed employee on probation. Around this same time, employee exercised her FMLA rights. The court held that employee sufficiently alleged a claim of FMLA retaliation, noting that temporal proximity of one month from the time she exercised her FMLA rights to when she was put on probation was sufficient at this early pleading stage. Thus the court vacated the district court's dismissal and remanded the matter for further proceedings.

***Ramirez v. Bolster & Jeffries Health Care Grp., LLC*, No. 1:12-CV-00205-GNS-HBB, __ F. Supp. 3d __, 2017 WL 4227944 (W.D. Ky. Sept. 22, 2017)**

Employee was employed as a Certified Nursing Assistant by employer Bolster & Jeffries Health Care at a nursing home facility in Elkton, Kentucky. In April 2012, employee requested and was approved for FMLA leave for the upcoming birth of her daughter, scheduled to occur in July 2012. However, in May 2012 employee's supervisors learned that she purportedly refused to transfer or lift three residents, an allegation employee disputed, claiming that she was told by a former administrator that the transfer was undertaken to protect her unborn child. Employee subsequently was transferred to a position that did not require lifting patients, a position that was part time and paid less than her full-time position. Employee later took the requested FMLA leave for the birth of her child, returning in September 2012. Upon her return, employee was given the option of returning to her pre-May 2012 position or remaining in the position to which she had been transferred prior to the leave. Employee elected to return to the full-time, skilled-care position. In November 2012, employee was issued a verbal notice for being absent from work. In December 2012, she filed a lawsuit against employer, asserting a variety of claims under federal and state law, including interference and retaliation claims under the FMLA. In April 2013, employee was discharged after a resident's daughter reported finding feces on her mother. While the suit was pending, employee died, and her personal representatives continued to maintain the lawsuit.

Employer moved for summary judgment. As to the interference claim, the court concluded that because employee was given the option, and in fact elected, to return to the full-time position she held shortly before taking leave, employer had not denied her any benefit to which she was entitled under the FMLA. Thus, the court dismissed the interference claim. However, as to the retaliation claim, the court concluded that issues of material fact existed as to whether the transfer of employee to the part-time, lesser-paying position after she requested FMLA leave was motivated by her leave request. Accordingly, the court denied summary judgment as to the FMLA retaliation claim.

***Walker v. JP Morgan Chase Bank*, 262 F. Supp. 3d 574 (N.D. Ill. 2017)**

A bank teller who was approved for and took intermittent FMLA leave alleged that her termination was in retaliation for her usage of FMLA leave. Granting employer's motion for summary judgment, the court found that there was no evidence that employee was terminated because she took FMLA. Instead, the uncontested facts established that employee's termination was because of her performance issues, which included her failure to follow various policies despite multiple coaching attempts and written warnings. The court concluded that employee could not establish her *prima facie* case because she could not show that she was meeting the employer's legitimate expectations because of her performance shortcomings. Additionally, the court noted that employee was unable to identify a similarly-situated comparator who was treated more favorably where she did not show that another co-worker had a comparable set of failings. Dismissing the interference claim, the court found that an employee's right to reinstatement is not absolute and that employee failed to show that she was terminated because of her FMLA leave rather than her performance issues.

***Blakely v. Cessna Aircraft Co.*, 256 F. Supp. 3d 1169 (D. Kan. 2017)**

Employee had been a long-term employee of a subsidiary of the employer and had exercised FMLA rights while working for that subsidiary. Employee sued under the FMLA alleging retaliation when his offer of employment with the employer was rescinded accompanied by the employer's statement that "you know what's in your file." Employee filed his complaint notwithstanding the fact that he had not been an employee of the employer, nor had he exercised any FMLA rights in connection with the employer. Employer brought a motion to dismiss under Rule 12(b)(6), claiming employee failed to state a claim upon which relief could be granted.

In addressing employee's *prima facie* case, first, the court held that employee had engaged in a protected activity by requesting reasonable accommodation and by taking medical leave while working for the subsidiary of the employer. Next, the court held that a reasonable person would find employer's conduct adverse. Employee had been given verbal assurances that the job was "100% his," only for his offer to be revoked. Finally, the court held it is reasonable to infer that employee's medical leave at his previous employment had a "determinative impact" on employer's decision to rescind the offer in part based upon the statement "you know what's in your file" and the fact his file included his leave and medical records. Therefore, the court held that employee presented a facially plausible claim of retaliation and employer's motion to dismiss was denied.

***Higgins v. Town of Concord*, 246 F. Supp. 3d 502 (D. Mass. 2017)**

Employee had been the Town's acting recreation director and brought action against employers, alleging that they retaliated against her for taking leave under the FMLA to care for her husband by fabricating disciplinary issues and ultimately forcing her resignation. Employers moved to dismiss for failure to state a claim.

Employee began working for employers in 1989, and received consistently positive reviews for positions she held over the course of her employment. In June 2015, employee was rated as a "top performer" in an evaluation and her husband was diagnosed with cancer. Employee informed employers of the diagnosis and noted she would need to attend regular medical appointments with her husband. At this time employers did not provide employee with

FMLA paperwork or give notice of her FMLA rights. Employee attended medical appointments with her husband from July 2015 until the conclusion of her employment in February 2017. Through the fall of 2015, the town was searching for a full-time recreation director. Employers informed Employee that she could apply for the position, but that the Town would look externally to fill the position. In January 2016, employee for the first time received FMLA paperwork, which she completed and returned to employers. The following day, employers invited employee to a meeting to interview her about investigation into potential misconduct involving another employee. Employee was later asked by employers if she had spoken with anyone about the investigation, and when she responded that she had, employers told her she could be fired for doing so and informed Employee that she would not be appointed to the Recreation Director position because she had spoken about the internal investigation. Employers suggested that employee tell co-workers that she had decided against taking the position because of her husband's illness. In January 2016, employers announced at a meeting that employee was withdrawing from consideration for the recreation director. Two days later, employers approached employee and told her that she was required to sign Last Chance Agreement (LCA) as a condition of her employment and would otherwise be terminated. Employee signed the LCA without consulting a lawyer. Employee then answered questions at a staff meeting she believed were directed at her (but were not), and employers informed her that she had violated the LCA by answering the questions. Employee was given the option in February 2016 whether she wanted to resign voluntarily or be terminated, and received a letter from employers that she had been placed on administrative leave and would be terminated the following week. The next day, employee resigned, involuntarily.

The court held that employee adequately stated a claim for FMLA retaliation. Employee adequately pled a *prima facie* case of FMLA retaliation by showing that she availed herself of a protected FMLA right in taking FMLA leave to care for her husband, was adversely effected by employer's decision to terminate her, and there was a causal connection between employee's FMLA leave and her termination. There is no real dispute whether Employee completed FMLA paperwork and took time off from her position to attend her husband's medical treatments. When resignation is the result of an employer offering employee the choice between resignation and termination, resignation can amount to an adverse employment action. Because employee claims she was never previously disciplined before completing the FMLA paperwork, and in contrast was disciplined and forced to sign the LCA only after completing the paperwork, it can be concluded that employee's termination was causally connected to her act of exercising her rights under the FMLA. Thus, the court allowed employee's claim to move forward.

***Harrison v. Proctor & Gamble Distrib. LLC*, No. 1:15-CV-514, 2017 WL 5523150 (S.D. Ohio Nov. 17, 2017)**

Employee worked in employer's United States Customs Compliance department as a customs broker. During almost her entire tenure, she had been approved for intermittent FMLA leave to care for her son, who suffered from a serious health condition. In February 2012, after employee's manager was replaced, she started having issues with attendance and maintaining a consistent work schedule, some of which related to her FMLA use. Employer instructed employee on the need to provide proper advance notification for FMLA absences in non-emergency situations, and employer limited her ability to work from home to one day per week. In 2013, employee received a negative performance evaluation and was placed on a performance improvement plan. She then applied for and was granted FMLA leave for depression. In December 2013, employer issued to her a document titled "2014 Performance Expectations,"

which identified additional restrictions on employee's schedule and how she could use and report FMLA leave going forward. For example, she and other employees would not be required to use vacation time for her FMLA leave for the first 10 work days of absence. Employer also revoked her work-from-home privileges altogether. Employee continued to have attendance problems, and continue to receive negative performance evaluations. She was also granted additional leaves of absence for various reasons related to her health over the next year. And she was allowed to transfer to another department. While an employee, she sued alleging, among other things, FMLA interference and retaliation.

The United States District Court for the Southern District of Ohio granted summary judgment in employer's favor. It rejected employee's contentions that employer's requirements that she present a doctor's note for FMLA appointments, that she use vacation time for FMLA time off, and that her work was reassigned to account for her time off were adverse actions or otherwise interfered with her rights. Specifically, the court noted that "these actions are explicitly permitted by the FMLA." However, the court concluded that if employer in fact gave her negative annual evaluations, denied her annual pay raises, and took away her work-from-home privileges because she used FMLA-approved leave, that would be actionable. Thus, according to the court, employee established a *prima facie* case of both interference and retaliation.

The court concluded that employer proffered legitimate business reasons for any alleged adverse action: employee's frequent non-FMLA absences, her inability to maintain a consistent schedule, and failure to provide adequate notice of her need to take FMLA leave. Finally, the court held that employee could not show pretext, rejecting her argument that employer's articulated business decisions lacked credibility. According to the court, "[t]he fact that Plaintiff was able to use FMLA leave without incident for over a decade belies any argument that Plaintiff's use of FMLA leave caused Defendant to retaliate against [her], especially in light of Defendant's well-documented legitimate reasons for taking the minor disciplinary actions against [her] that occurred."

**Note: this case has been appealed to the Sixth Circuit (Case No. 17-4298*).

Clark v. Guilford Cnty., N.C., No. 1:16CV1087, 2017 WL 4357451 (M.D.N.C. Sept. 30, 2017)

Employee filed suit against her employer alleging employment discrimination in violation of three federal statutes, including the FMLA. Employer moved to dismiss all claims. The court denied the motion to dismiss as to employee's FMLA retaliation claim. The court found that employee adequately stated a *prima facie* case of FMLA retaliation in that she alleged that she took FMLA leave for surgery from June to September 2015, and that she was terminated upon her return from FMLA leave on September 1, 2015. The court found that employee's allegations, taken as true, were sufficient to plausibly state an FMLA retaliation claim.

Coleman v. Caterpillar, Inc., No. 1:15-cv-01001-SLD-JEH, 2017 WL 3840423 (C.D. Ill. Sept. 1, 2017)

Employee sued employer for interference and retaliation under the FMLA. But because employee provided no evidence that employer ever prevented her from taking leave under the FMLA, the court dismissed employee's interference claim. That is, there was no evidence that employer interfered with employee's exercise of her right to take FMLA leave.

The court explained that to prove retaliation under the FMLA, an employee must show that she suffered a materially adverse action for engaging in a protected activity. Alternatively, an employee May proceed under the *McDonnell Douglas* burden-shifting method. Under this latter method, an employee must establish (1) that she engaged in a protected activity, (2) that the employer took an adverse action against her, and (3) that there is a causal connection between her protected activity and the adverse action. If the employee does so, the employer must articulate a legitimate, non-discriminatory reason for the action. Then, if the employer meets its burden, the burden shifts back to the employee to demonstrate that the offered reason is pre-textual.

In employee's case, she could not show any causal connection between her termination and her taking of FMLA leave. Thus, employee could not show that employer terminated her because she took FMLA leave or that her taking the FMLA leave was the "but for" cause of her termination.

***Grant v. Hosp. Auth. of Miller Cnty.*, No. 1:15-CV-201 (LJA), 2017 WL 3527703 (M.D. Ga. Aug. 16, 2017)**

Employee asserted that employer, a non-profit medical facility, violated the FMLA, among other things, when it terminated her after she was unable to return to work due to complications from a pregnancy. In September 2014, employee's doctor ordered her on bed rest for one week and sought information from employer about her leave options under the FMLA. The same day, employee was approved for FMLA leave, which was set to expire on December 9, 2014. On December 5, 2014, employee gave birth to her baby prematurely. Employer told employee it understood that she would need time to recover from her caesarean section, and that she would need a return-to-work certificate. Employee did not return to work upon the expiration of her FMLA leave, she never requested additional leave, and she did not provide a return-to-work certificate. Employer terminated her on December 18, 2014 for failure to report to work. She sued, alleging interference and retaliation under the FMLA.

The United States District Court for the Middle District of Georgia granted employer's motion for summary judgment. It concluded that employer presented no evidence that employee was denied an FMLA benefit: "Indeed, Plaintiff received 12 weeks of FMLA leave." And because she did not return to work after her FMLA leave expired, according to the court, employer satisfied its FMLA obligation. Regarding the retaliation claim, the court held that employee could establish her *prima facie* case, but not that employer's articulated reason for her termination was a pretext.

***Coleman v. Bank of America, N.A.*, No. 3:16-CV-1439-G, 2017 WL 3334104 (N.D. Tex. Aug. 4, 2017)**

Employee, who was an anti-money laundering representative for defendant banking institution, brought retaliation claim for asserting her FMLA rights. Employee contended that she was terminated due to complaints she lodged about her dissatisfaction for being forced to use paid leave concurrently with her unpaid FMLA leave. The district court granted employer's motion for summary judgment. Retaliation claims brought under the FMLA are analyzed under the burden shifting framework espoused in *McDonnell Douglas*, in which employee must establish a *prima facie* case of discrimination: (1) they engaged in protected activity; (2) the

employer took an adverse employment action against employee; and (3) a causal connection exists.

The court agreed with employer that employee did not engage in a protected activity. The relevant federal regulations provide that an employer May require an employee to use paid leave concurrently with FMLA leave. Thus, employer's act of requiring employee to take concurrent paid leave was not an unlawful activity. Therefore, employee's opposition did not constitute a protected activity.

The court also concluded that employee presented no evidence that a causal connection existed between the complaints she made and her termination. The defendant decisionmakers responsible for terminating employee had no knowledge of her complaints. Thus, the adverse employment action could not be said to have been employer's response to her complaints. Employee failed to produce evidence to establish her *prima facie* case.

Even assuming employee did produce evidence to establish her *prima facie* case, employer produced evidence of a legitimate, non-discriminatory reason in support of the termination decision for which employee did not demonstrate was pretext. Employee engaged in "structuring" banking transactions, which is a violation of the relevant banking laws. In turn, violations of the law are a violation of the banking institution's code of conduct applicable to all employees. Employee filed an appeal with the Fifth Circuit Court of Appeals on September 8, 2017.

***Calahan v. Pain Mgmt. Grp., P.C.*, No. 3:16-cv-0847, 2017 WL 3237579 (M.D. Tenn. July 31, 2017)**

Employee filed this action, alleging that employers, Pain Management Group and Decennial, interfered with her FMLA rights and retaliated against her for exercising her FMLA rights by terminating her while she was on FMLA leave. Employers filed a motion for summary judgment. The district court in Tennessee granted summary judgment in favor of employer Pain Management Group because it no longer was employee's employer at the time of the alleged actions due to sale of its practice to Decennial. However, the court denied summary judgment to employer Decennial.

Employee was a custodian who cleaned employer's medical clinic and surgery center. After Decennial took over management, it realized that the services employee provided were not up to the necessary standard of cleanliness. Employee's supervisor informally counseled her about the issues and testified that her performance improved after counseling. A few months later, employee notified employer that she needed to take FMLA leave to have knee surgery. During that same time, employer made the decision to hire a cleaning company to take over employee's position, but informed employee she would have her position back once she returned. However, when employee returned from leave, employer informed her that her position was no longer available. Employer argued in its motion for summary judgment that employee's poor cleaning performance was a legitimate, nondiscriminatory reason for its actions and that employee could not show that its reasons were pretextual. The court rejected this argument because there was no formal written discipline in employee's file and she had improved after she had been counseled.

Employer further argued that it had been in communications with the cleaning company before employee gave her informal notice of FMLA leave. The only evidence employer provided of this was a copy of the contract with the cleaning company that was finalized on the same day that employee formally gave notice. The court rejected employer's argument and held that the suspicious timing of events along with employer's witnesses' vagueness about the timeline and equivocations as to its intention gives rise to the permissible inference that employee was terminated in retaliation for her exercise of FMLA leave and employer interfered with her right to reinstatement when it declined to allow her to return to work after her FMLA leave. Thus, the court denied employer Decennial's motion for summary judgment.

***Cronk v. Dolgencorp, LLC*, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)**

In July 2014, employee, a store manager, informed her supervisor, the district manager, that she intended to take medical leave in December 2014 for carpel tunnel surgery. The district manager informed employee that she could not take leave in December because the store would be too busy; employee did not propose alternate dates for the surgery. Though employee was aware that employer's policies direct employees to immediately notify both their supervisor and employer's third-party administrative vendor of FMLA requests, employee only notified her supervisor. In September 2014, employer terminated employee's employment, stating that she had improperly handled a shoplifting incident in August 2014. Employee brought suit against employer alleging that employer violated her FMLA rights (1) by interfering with her ability to take FMLA leave and (2) by retaliating against her for exercising her rights under the FMLA. Employer moved for summary judgment on both of employee's claims.

Under *McDonnell Douglas*, and in the absence of direct evidence, a successfully pleaded *prima facie* case of FMLA retaliation shifts the burden of proof to employer to show a legitimate, nonretaliatory reason for its adverse employment action. In the Sixth Circuit, *McDonnell Douglas* is applied to FMLA claims for interference as well as for retaliation. Employer argued that employee could not make a *prima facie* showing of FMLA interference because employee was not denied benefits to which she was entitled, as employee never took the steps necessary (i.e., notifying employer's third-party vendor of the requested leave) to obtain said benefits. The court agreed that employee had not established a *prima facie* case of FMLA interference.

With respect to the retaliation claim, employer argued that employee could not set forth a *prima facie* case because employee's protected FMLA activity was not the "but-for" cause of her termination. The court first noted that employee need not establish "but-for" causation to establish a causal relationship sufficient to make a *prima facie* showing of retaliation. Then, relying on Sixth Circuit case law, the court found that the temporal proximity between employee's protected FMLA activity in July 2014 and her termination in September 2014 established a causal connection between the two events. Consequently, the burden of proof shifted to employer to articulate a legitimate, non-retaliatory reason for employee's termination. The court concluded that employer met its burden. Since employee had clearly violated employer's shoplifting prevention procedures in August 2014, employer reasonably relied on particularized facts sufficient to defeat any inference of pretext. Therefore, the court granted employer's motion for summary judgment in its entirety.

***Balding v. Sunbelt Steel Tex., Inc.*, No. 2:14-CV-00090, 2017 WL 1435719 (D. Utah Apr. 21, 2017)**

The court granted employer's motion to reconsider its decision vacating summary judgment in favor of employer on employee's FMLA interference and retaliation claims. The court held that its prior ruling misapprehended the controlling law, and that its original decision dismissing all of employee's FMLA claims on summary judgment was correct.

Employee went on leave after suffering a panic attack, and was terminated by employer for poor performance and dishonesty. The court determined that employer had knowledge that employee had reported medical issues over the years that ultimately led to his taking leave, and that there was a close temporal proximity between employee requesting time off and his termination. Since employer provided poor performance and dishonesty as a legitimate nondiscriminatory reason for employee's termination, employee bore the burden of rebutting employer's proffered reason. Employee failed to rebut employer's explanation, and the court held that temporal proximity and knowledge or awareness of employee's medical concerns do not alone support an inference of pretext.

The court explained that evidence of pretext previously identified was error, because it misapprehended *Olson v. Penske Logistics, LLC*, 885 F.3d 1189 (10th Cir. 2016) and did not give sufficient attention to the body of pretext precedent in the Tenth Circuit. The court explained that *Olsen* does not require employer to conduct a thorough investigation to rebut an allegation of pretext and that the court's previous reliance on *Smothers v. Solvay Chemicals, Inc.*, 740 F.3d 530 (10th Cir. 2014) failed to consider that the decision-makers in *Smothers* did not allow employee an opportunity to tell his side of the story and instead relied on a version of events reported by co-workers. Employee in this case did not present sufficient evidence that employer did not genuinely believe that employee had engaged in the alleged misconduct and dishonesty. The court examined the fact that senior management had previously agreed that employee May have to be terminated at the first of the year, at which the time they were fully aware of employee's medical issues. As to this issue, the court concluded that knowledge alone of a reported medical condition cannot support an inference of pretext, although such knowledge can support a *prima facie* case.

***Robertson v. Home Depot Inc.*, No. CV 14-806-JWD-EWD, 2017 WL 1088091 (M.D. La. Mar. 22, 2017)**

Employee, an African-American male, began work at Home Depot in Baton Rouge, Louisiana as a sales associate around 2002. A year later, he departed Home Depot to work for another retailer, reapplying for employment at Home Depot in 2005. In February 2006, he was promoted to Salaried Assistant Store Manager at the Home Depot store on Airline Highway, Baton Rouge. Following transfers to other Louisiana stores, he returned to the Airline Highway store in 2011. Employee did not believe he was getting along with the Airline Highway store manager. In his 2012 yearly evaluation, the store manager referred to employee as arrogant, cold, and aloof. In 2013, the store manager issued to employee a Progressive Disciplinary Notice, stating that employee's "engagement with the Inventory process was substandard." Around the same time, employee was interviewed regarding an employee in his group who May have been responsible for bad time punches. A while later, employee went on FMLA leave for "stress behind work" and his mother's poor health. Prior to going out on leave, he sent an email to Corporate alleging that his store manager and the District Team had "personal

vendettas" against him and asking that his Progressive Disciplinary Notice be removed. Employee had no issues in procuring FMLA leave.

On returning to work, he received a discipline notice regarding the "bad time punches" incident. After receiving this notice, he sent a second email to Corporate, again complaining about his store manager. Corporate responded by transferring employee to Denham Springs, Louisiana and rescinding his discipline notice, as well as the one issued to the employee who had been responsible for the bad time punches. In December 2013, a female employee anonymously complained that employee had violated her personal space. Later, the female employee complained that employee had grabbed her ponytail. After an incident where employee was observed on closed circuit video snatching the scrunchee out of the female employee's hair, employee was terminated for violation of Home Depot's Acceptable Workplace Conduct and Behavior Policy.

Employee brought an FMLA retaliation claim against Home Depot. Employer filed a motion for summary judgment. The court found that employee could not meet his *prima facie* burden. In his deposition, he testified that Home Depot had retaliated against him because of the two emails he had written, and that he did not believe he had been retaliated against because he took leave. No other evidence existed in the record to show that his termination had resulted from his taking FMLA leave. Even if he had met his *prima facie* burden, the court held that employer provided several legitimate, nondiscriminatory reasons for terminating him (the "bad time punches" incident and violation of the Acceptable Workplace Conduct and Behavior Policy). Because employee could not show that these reasons were pretextual, the court held that "without question, summary judgment [was] warranted."

***Rodriguez v. Reston Hosp. Ctr., LLC*, No., 1:16-cv-623 (JCC/JFA), 2017 WL 772348 (E.D. Va. Feb. 28, 2017)**

The district court denied employer's motion to dismiss CT Technologist's FMLA retaliation and interference claims. Employer's stated reason for terminating employee was that he had failed to timely complete his CT recertification process. The court determined that employee's allegations in his complaint that he was discharged less than 60 days after returning from FMLA leave, and that his employer required him to complete a "return to work plan" which delayed his return to work and was not required of other employees were sufficient to withstand the motion to dismiss. Similarly, the court found that employee's allegations that the imposition of the return to work plan obligation, employer's refusal to not extend employee's CT certification deadline by the amount of time he had been on FMLA leave, and the fact that employee was discharged were enough to survive a motion to dismiss.

Summarized elsewhere:
***Waag v. Sotera Def. Solutions, Inc.*, 857 F.3d 179 (4th Cir. 2017)**

***Hodnett v. Chardam Gear Co.*, No. 16-10619, 2017 WL 6621527 (E.D. Mich. Dec. 28, 2017)**

***Bailey v. Quest Diagnostics, Inc.*, No. 1:17-CV-625, 2017 WL 6524950 (E.D. Va. Dec. 19, 2017)**

***White v. Smiths Med. ASD, Inc.*, No. 3:15-cv-01501-VLB, 2017 WL 4868556 (D. Conn. Oct. 27, 2017)**

***Perkins v. Child Care Assoc.*, No. 4:16-CV-694-A, 2017 WL 3634607 (N.D. Tex. Aug. 22, 2017)**

***Nelson v. Ceramtec N. Am. Corp.*, No. 6:16-0367-HMH-JDA, 2017 WL 3473996 (D.S.C. Aug. 14, 2017)**

***Lawson v. CertainTeed Corp.*, No. CV 1:16-0238, 2017 WL 1498511 (W.D. La. Apr. 24, 2017)**

***Johnson v. Camden City Sch. Dist.*, No. 1:15-CV-01124-NLH-JS, 2017 WL 1227925 (D.N.J. Apr. 3, 2017)**

***Popko v. Penn State Milton S Hershey Med. Ctr.*, No. 1:13-CV-1845, 2017 WL 1078158 (M.D. Pa. Mar. 22, 2017)**

a. Exercise of Protected Right

***Sanders v. Temenos USA Inc.*, No. 16-cv-63040-BLOOM/Valle, 2017 WL 4577235 (S.D. Fla. Oct. 13, 2017)**

Employee brought FMLA interference and retaliation claims against his former employer, Temenos USA, Inc. alleging that he was terminated shortly after requesting FMLA leave in order to recover from his serious health conditions. Employee was suffering from clinical major depression and gout. On August 25, 2013, employee emailed employer about his medications and, on August 26, 2013, employee spoke over the telephone with Human Resources about his health-related and personal issues. Employer terminated employee on August 28, 2013 on the grounds that he was expected at a meeting during the week of August 19, 2013, did not show up, and no one could reach him as well as failure to meet deadlines, tardiness, and behavior. Employer maintains that it made its decision to terminate employee before receiving employee's August 25, 2013 email.

With respect to both of the FMLA claims, the court held that employee failed to provide employer with sufficient notice of his need or request for FMLA leave – a threshold requirement. The court reasoned that, at most, employee's pertinent communications with his employer apprised employer of a "medical condition" that affected his walking and of the medications he was taking at the time, but indicated that even viewed in a light most favorable to employee, the communications did not place employer on notice of employee's need for leave or that employee was planning on taking leave. Additionally, with respect to employee's retaliation claim, the court held that employee could not demonstrate a causal connection between any need or request for FMLA leave and his termination, thereby falling short of establishing a *prima facie* case. Lastly, the court held that employee's retaliation claim must fail because he cannot show that employer's legitimate, non-discriminatory and non-retaliatory reason for his termination was a pretext.

***Baker v. Goldberg Segalla LLP*, No. 16-CV-613-FPG, 2017 WL 1243040 (W.D.N.Y. April 5, 2017)**

Employee worked as a legal assistant. She became seriously ill and requested leave in September 2013. Upon notification to her law firm employer, she was placed on FMLA leave. In January 2014, while still absent from work, employee was notified she had received a raise.

In July 2014, forty-five weeks after she went on leave, employee notified the law firm she expected to return to work on August 1, 2014. Two days before her announced return date, employee was contacted and told she was terminated. Employee alleged that she was told that her employment was terminated because her FMLA had expired several months prior. Employee filed a lawsuit asserting claims for interference and retaliation. The law firm moved to dismiss. Over the magistrate judge's R&R, the district court granted the law firm's motion. Employee's interference claim was dismissed because (1) she failed to allege she was denied benefits to which she was entitled under the FMLA, and (2) she was not prejudiced by the law firm's failure to notify her when her FMLA leave actually expired. The court held that because employee failed to allege that she could or would have returned to work upon expiration of her FMLA leave, she had not sufficiently alleged the required prejudice to proceed with an interference claim. The court also dismissed employee's retaliation claim, reasoning that the essence of employee's claim was that she was terminated because she asked to be reinstated 45 weeks after she originally went on leave. Because reinstatement after FMLA leave has expired is not a right protected by the FMLA, employee failed to allege that she engaged in any protected activity, requiring dismissal of her retaliation claim.

Summarized elsewhere:
***Bertig v. Ribaudo HealthCare Grp., LLC*, No. 3:15CV2224, 2017 WL 4922012 (M.D. Pa. Oct. 31, 2017)**

***Zalenski v. Wilkes-Barre Hosp. Co.*, LLC, No. 3:15-CV-2428, 2017 WL 3929320 (M.D. Pa. Aug. 21, 2017)**

***Cronk v. Dolgencorp, LLC*, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)**

***Jansson v. Stamford Health, Inc.*, No. 3:16-CV-260 (CSH), 2017 WL 1289824 (D. Conn. Apr. 5, 2017)**

b. Adverse Employment Action

***Shultz v. Congregation Shearith Israel*, 867 F.3d 298 (2d Cir. 2017)**

Employee sued employer for interfering with her rights under the FMLA. Specifically, employee claimed that employer fired her mere weeks before she was scheduled to take previously approved leave for her pregnancy. After the trial court granted employer's motion to dismiss, employee appealed the dismissal. To prevail on an interference claim, an employee must show: (1) she is eligible under the FMLA; (2) employer is an "employer" as defined by the FMLA; (3) she was entitled to take FMLA leave; (4) she gave notice to employer of her intention to take leave; and (5) that she was denied benefits to which she was entitled under the FMLA.

The Second Circuit vacated and remanded the district court's judgment. The court reasoned that notice of termination – which is rescinded before the termination is implemented – is still an adverse employment action. The notice of termination itself is an adverse employment action, even when employer later rescinds the termination. That employee left work pursuant to the original termination notice did not change that the notice of termination itself is an adverse employment action. Likewise, the fact that employer kept issuing paychecks to employee even after her termination date did not do away with the adverse employment action (i.e. notice of termination).

***Drechsel v. Liberty Mut. Ins. Co.*, 695 F. App'x 793 (5th Cir. 2017)**

Employee brought suit alleging FMLA retaliation against former employer. During his employment, employee had taken multiple instances of leave. After the last period of leave, employer's third-party administrator determined that employee was not eligible for short-term disability benefits and denied his request. Employee resigned soon thereafter. The district court granted employer's motion for summary judgment, finding that he had not suffered an adverse employment action, and employee appealed.

On appeal, employee argued that there was sufficient evidence that he suffered three adverse employment actions: disparate compensation, lack of promotion, and constructive discharge. The court rejected employee's arguments. While employee claimed that he was paid less than two comparators, the court found that the alleged comparators held different titles, reported to different supervisors, and had more complex duties than employee. Therefore, the court concluded that these individuals were not proper comparators. As for employee's contention regarding the failure to promote him, the court determined that the claim failed because employee did not adduce evidence that he was not promoted in favor of someone who had not requested FMLA leave. Finally, the court rejected employee's contention that he was constructively discharged as a result of emails sent by his supervisor and the fact that he received a heavier workload than his peers. In the court's view, the evidence of record did not support either of those claims. Therefore, the court of appeals affirmed the district court's grant of summary judgment to employer.

***Clark v. Philadelphia Hous. Auth.*, 701 F. App'x 113 (3d Cir. 2017)**

Employee sued employer for retaliation under the FMLA. Specifically, employee claimed that employer retaliated against her in 2013 and 2014 by subjecting her to a pattern of antagonism due to her intermittent leave in 2004. Employee also claimed that employer interfered with her FMLA rights by not offering her FMLA leave and requiring her to use accumulated sick leave. Ultimately, the Third Circuit Court of Appeals affirmed the lower court's dismissal, which was based on employee's claims being time-barred and her failure to allege an adverse employment action. The Third Circuit also affirmed dismissal of employee's interference claim based on the FMLA allowing employer to require that employee use sick leave in place of FMLA leave.

To make a *prima facie* case of retaliation, the Third Circuit Court explained that an employee must show that: (1) she invoked her right to FMLA-qualifying leave; (2) she suffered an adverse employment action; and (3) the adverse action was causally related to her invocation of rights. Further, to satisfy the causation prong, an employee May rely upon either an (1) unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with the timing. To state a claim for interference under the FMLA, an employee must show: (1) he or she was an eligible employee under the FMLA; (2) the employer was an employer subject to the FMLA; (3) the employee was entitled to FMLA leave; (4) the employee gave notice to the employer of his or her intention to take FMLA leave; and (5) the employee was denied benefits to which he or she was entitled under the FMLA.

As grounds for affirming the lower court's dismissal, the Third Circuit noted the more than 4-year gap that existed between employee's invocation of her FMLA rights in 2004 and the

alleged pattern of antagonism in 2013 and 2014. Further, relying on a United States Supreme Court case holding that written reprimands did not constitute an adverse employment action for FMLA retaliation purposes, the Third Circuit found that the alleged negative statements in employee's performance review in 2014 did not constitute an adverse employment action. That is, the statements were not a significant change in employment status (i.e. hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits). Employee simply failed to allege facts from which it could be inferred that the unfavorable performance reviews adversely affected the terms or conditions of her employment. Regarding employee's interference claim, the court noted that the FMLA provides that "[a]n eligible employee May elect, or an employer May require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided." Therefore, employer was entitled to require employee to use her accumulated sick leave in place of FMLA leave.

***Davis v. Kimbel Mech. Sys., Inc.*, No. 5:16-CV-5194, __ F.R.D. __, 2017 WL 4810707 (W.D. Ark. Oct. 25, 2017)**

Employee, who held various positions including receptionist and manager during her employment with employer, filed suit against employer after an alleged reduction in pay and demotion, asserting among other things that employer retaliated against her for filing for FMLA benefits. Employer filed for summary judgment, which the court granted as to the FMLA retaliation claim. The court held that employee could not establish that her change from an hourly employee to a salaried employee was an adverse employment action, even though she cited that her salary would decrease from the previous year, given that she had worked inordinantly high overtime the previous year and she put forward no evidence to counter employer's evidence that she was actually helped by the conversion. However, the court did hold that there was sufficient dispute of fact to deny summary judgment as to the question of whether employee was demoted and therefore suffered an adverse employment action.

However, the court held that even if employee could establish an adverse employment action, her *prima facie* case failed on the causation element, given that all of the allegedly adverse employment actions occurred in or around April of 2015, whereas she did not request FMLA leave until the beginning of September of 2015 and did not allege any adverse action that took place after that request. Therefore, employee could not establish a *prima facie* case for retaliation.

In terms of employee's interference claim, the court held that employee had not demonstrated that she was in any way prejudiced by any alleged interference. The only allegation employee gave was that she had to request the leave, instead of employer offering it; the court held that this was insufficient given that every one of her requests for accomodation and FMLA benefits was granted, and that she still was, in fact, receiving benefits. Therefore, employee could not make out a claim for interference.

***Marsh-Godreau v. SUNY at Potsdam*, No. 815CV437LEKCFH, 2017 WL 5891791 (N.D.N.Y. Nov. 28, 2017)**

Employee worked as a keyboard specialist for the State University of New York ("SUNY") at Potsdam. She had numerous responsibilities, including performing secretarial services and data entry for employer's annual report, and supervising student employees. In

2011, employee was diagnosed with bipolar disorder and took medical leave. In 2015, employee filed an action against employer, alleging retaliation in violation of the FMLA. Employee claimed SUNY carried out adverse employment actions by (1) requiring her to attend weekly meetings with her supervisor after returning from medical leave; (2) removing her data entry responsibilities; and (3) placing a memo detailing employee's behavior in her personnel file. The court granted employer's motion for summary judgment, stating that employee had not been terminated or demoted; her job responsibilities had not changed in any materially significant way; she still performed data entry for the annual report; she continued to receive salary increases. The court said, "[a] plaintiff establishes a *prima facie* case of retaliation under the FMLA if he provides evidence showing 'that (1) he exercised rights protected under the FMLA; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent.' *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 429 (2d Cir. 2016)." The court stated that without assessing the other elements of employee's *prima facie* case, it found that employee's retaliation claim failed because she did not show that she suffered an adverse employment action.

***Kaczmarek v. Cnty. of Lackawanna Transit Sys.*, No. 3:17-CV-00950, 2017 WL 5499160 (M.D. Pa. Nov. 16, 2017)**

The court denied employer's motion pursuant to Federal Rule of Civil Procedure 12(b)(6). Employee's complaint sufficiently alleged that employer's surveillance of employee in the workplace and in his private life constituted an adverse employment action under the FMLA. The court found that the surveillance of employee roughly eight (8) days after he commenced FMLA leave supported an inference that the alleged adverse employment action was caused by employee's decision to take FMLA leave. The Court concluded that employee's pleading which included facts regarding disparaging comments that were made to employee after he made a request for FMLA leave, and the 14-day surveillance of employee at his private residence constituted a pattern of antagonism.

***Compliment v. Sanofi-Aventis US, Inc.*, No. 1:16-cv-3477-WTL-DML, 2017 WL 4074630 (S.D. Ind. Sept. 14, 2017)**

Employee brought suit against former employer alleging FMLA retaliation. Employee claimed, among other things, that after she returned from FMLA leave, her manager took away her flex time, no longer allowed her to take Fridays off, and treated her differently than employees who had not required FMLA leave. A district court in Indiana denied employer's motion to dismiss, after concluding that employee stated a *prima facie* case. First, employee engaged in statutorily protected activity – she took leave to give birth to her daughter. Second, the alleged retaliatory conduct could have dissuaded a reasonable person from taking leave. Third, there was a causal connection between employee's FMLA leave and the alleged adverse actions. Thus, the court denied employer's motion to dismiss.

***Hall v. Dougherty Cnty. Sch. Sys.*, No. 1:15-CV-189 (LJA), 2017 WL 3584908 (M.D. Ga. Aug. 17, 2017)**

Employee is a former teacher and filed this action in Middle District of Georgia claiming employer interfered with his right to be restored to a position of employment held by employee

when his FMLA leave commenced and employer retaliated against him when he was replaced. Employer filed for summary judgment.

Employee claimed employer replaced and constructively discharged him when minutes from a board meeting indicated that employer was hiring a replacement to teach employee's classes. Employee subsequently resigned before he was scheduled to return from FMLA leave. However, there was no mention that the replacement would be permanent or that employee would not be assigned to an equivalent position upon his return. The court granted employer's summary judgment motion as to employee's FMLA interference and retaliation claims since there was no evidence that employer interfered with employee's return to work or that employer constructively discharged employee.

***Sartin v. Okla. Dep't of Human Servs.*, No. 15-CV-686-TCK-tlw, 2017 WL 3033130 (N.D. Okla. July 17, 2017)**

Employee sued employer for retaliation under the FMLA. Specifically, employee claims that employer retaliated against her by reprimanding her and requiring her to travel. The FMLA prohibits an employer from retaliating against an employee for opposing a practice that is unlawful under the FMLA. To make a *prima facie* case of retaliation, an employee must show that: (1) she engaged in protected activity; (2) her employer took an action that a reasonable employee would have found materially adverse; and (3) there exists a causal connection between the protected activity and the adverse action.

In granting employer's motion for summary judgment, the district court concluded that the alleged reprimand and requested travel did not constitute materially adverse actions. According to the Tenth Circuit, written warnings and reprimands are generally not materially adverse actions where there is evidence that the employee remains employed or that the employee was not adversely affected (e.g., lost promotion or more discipline). That being so, disciplinary proceedings, such as warning letters and reprimands, can still constitute an adverse action. The proceedings, however, must adversely affect the terms and conditions of an employee's job. Second, because employee's job required her to travel before she took FMLA leave, it was not an adverse action that she had to travel afterwards.

***Trahanas v. Nw. Univ.*, No. 15-CV-11192, 2017 WL 2880879 (N.D. Ill. July 6, 2017)**

A research technician alleged that she was retaliated against for exercising her right to FMLA and identified two adverse actions: that she was locked out of her work computer when she went on leave and that her supervisors uploaded a negative recommendation to her medical school application. Although the court found that being locked out of the computer was "likely a minimal inconvenience," it concluded that the negative recommendation "might well be sufficient to dissuade a worker from trying to take leave." Thus, the court denied employer's motion to dismiss the retaliation claim. It concluded however, that the FMLA interference claim failed because employee did not allege she was fired or that she attempted to return to her prior position. While employee was not able to secure a different position upon her return from leave, the court noted that the only entitlement is to the job employee had when she took leave.

***Jackson v. La. Dep't of Pub. Safety & Corrs.*, No. 15-00490-JJB-RLB, 2017 WL 2786493 (M.D. La. June 27, 2017)**

Employee sued his employer, the Louisiana Department of Public Safety and Corrections, for allegedly retaliating against him for taking leave under the FMLA. He claimed that the letter he received from employer denying his request for 25 days of vacation in 2015 due to his "leave usage in the previous calendar year" was direct evidence of retaliation. Employer moved for summary judgment. The Middle District Court of Louisiana found that the letter was not direct evidence of retaliation because it did not demonstrate retaliatory animus without any inferences or presumptions. In the absence of direct evidence, the district court applied the *McDonnell Douglas* framework and found that the letter was insufficient to establish a *prima facie* case of retaliation because it did not prove that employee suffered any adverse employment action or that the alleged adverse employment action was caused by his use of FMLA leave. As the court explained, "a single denial of leave is not an adverse employment action when it affects leave on a specific date and time, but not the employee's amount of or right to take leave in general." Employee's request for 25 days of vacation May have been denied, but he was still permitted to take vacation and leave that year. In fact, employee did take seven consecutive days off in 2015. In addition, even assuming that employee was able to demonstrate that he suffered an adverse employment action, he still could not illustrate that it was caused by his use of FMLA leave the previous year. At least 10 months had lapsed between employee's use of FMLA leave and the denial of his vacation request. Further, the denial was made in accordance with department policy, which allowed for FMLA leave to be considered in determining whether or not vacation time would be granted. Accordingly, employee's claim for retaliation could not survive summary judgment and was dismissed.

***Dyer v. Wal-Mart Stores, Inc.*, No. 16-cv-12496, 2017 WL 2213570 (E.D. Mich. May 19, 2017)**

Employee brought suit against Wal-Mart claiming that she was terminated from her position as a Deli Department Manager in retaliation for requesting leave pursuant to the FMLA. Employee had requested FMLA leave in order to care for her husband while he recovered from surgery, but ultimately she did not take any FMLA leave. Employer brought a motion for summary judgment arguing that there existed nondiscriminatory reasons for terminating her.

The court found that employee was unable to meet her burden under the *McDonnell Douglas* burden-shifting framework because she was unable to show that her termination was motivated by her FMLA request. Employer had proffered a legitimate, nondiscriminatory reason for terminating her employment after it had conducted a thorough investigation. Specifically, employer had concluded that employee had violated food safety procedures and had been disrespectful to her co-workers. The only argument employee could make in support of her claim was the temporal proximity between her request for FMLA leave and employer posting a job opening for her position. The court held that this was insufficient to establish that employer's reason for discharging her was pretextual. Therefore, the court granted summary judgment as to employee's FMLA claim.

***Ejiogu v. Grand Manor Nursing & Rehab. Ctr.*, No. 15CV505 (DLC), 2017 WL 1184278 (S.D.N.Y. Mar. 29, 2017)**

Employee, an in-service coordinator employed by defendant nursing home requested time off to visit her seriously ill mother in Nigeria. Employer approved of two weeks off non-FMLA leave but failed to advise employee of her eligibility to take up to twelve work weeks off under the FMLA. Ultimately, employee's mother died and employee then took twelve workweeks of self-care FMLA leave. Upon her return to work, employer asked employee to supply a more specific authorization from her doctor to return to work. Employee provided the more specific authorization. Employer also met with employee to inform her that her job duties would include several new tasks that the temporary in-service coordinator performed while employee previously was on FMLA leave. During the meeting, employee objected to the additional duties, and an argument ensued between employee and employer. Employer grabbed employee's phone based on the belief that employee was recording the meeting. Consequently, employer drafted a suspension letter, but did not send it. Employee never returned to work and employer terminated her for voluntary job abandonment.

Employee asserted FMLA retaliation and interference claims based on the foregoing facts. On the retaliation claim, the court concluded that a single incident of phone grabbing, and the act of drafting a suspension letter without implementing the suspension do not qualify as adverse actions. While employee made a minimal showing of retaliation based on the temporal proximity of her termination to her FMLA leave, employer established a legitimate nondiscriminatory reason for the termination, voluntary abandonment of her job and employee failed to establish that the reason was pretextual.

On employee's FMLA interference claim, the district court denied summary judgment because defendants failed to notify employee that she was eligible for up to twelve work weeks of FMLA leave when she first requested time off to visit her ailing mother. The court rejected the defense argument that eventually providing employee with all required leave under the FMLA defeated her FMLA interference claim. However, the court granted summary judgment on her interference claim in all other respects. The court concluded the employer's request for clarification of an authorization to return to work did not rise to the level of FMLA interference because employee's return to work was not delayed. The also court rejected employee's assertion that adding several new human resource duties to her job description impinged on her reinstatement rights because these changes did not transform her position into a "different" position under the FMLA.

***Bolek v. City of Hillsboro*, No. 3:14-CV-00740-SB, 2017 WL 627218 (D. Or. Feb. 13, 2017)**

Employee, a manager with the police department for the City of Hillsboro, accused her employer of: (1) interfering with her rights under the FMLA, and (2) retaliating against her for exercising her rights under the FMLA. After employee suffered a cardiac arrest, the city approved her for intermittent FMLA leave. Then, at an employee meeting, the chief of police announced a reorganization. Employee would lose certain responsibilities and her subordinates would be reassigned. Further, employee would no longer report to the chief of police. Instead, she would report to a peer. When employee protested, the chief of police admittedly became "pissed," and responded with "insulting" conduct, "unacceptable" demeanor, and "forceful" body language. According to employee, he also yelled profanities and publicly humiliated her. And when she asked for a private meeting, he refused and said that the changes were for her

"own good because of her medical condition." The city subsequently investigated in response to employee's complaint.

After considering the parties' competing motions for summary judgment, the district court judge agreed with the magistrate judge and granted employer's motion. To be sure, an employer is prohibited from interfering with an employee's exercise of rights under the FMLA. That is, an employer cannot refuse to authorize leave. Nor can it discourage the use of such leave. And, an employer cannot use the taking of FMLA leave "as a negative factor in employment actions." In employee's case, the court noted that she received her FMLA entitlements. Moreover, there was no adverse employment action, which is required to prove retaliation. That employee claims she was humiliated, demeaned and treated "mean" would not have dissuaded a reasonable worker from exercising her rights, and, thus, it was not sufficient to establish a materially adverse action. Also, the FMLA allows a transfer of duties while an employee is on leave. For example, the court cited a Ninth Circuit decision holding that "[t]he limited reassignment of [plaintiff's] email and custom correspondence duties constituted an insignificant change in [] employment status and did not individually or cumulatively constitute an adverse employment action." Likewise, the court was not persuaded by employee's argument that the city's "sham or phony" investigation constituted an adverse employment action because it discouraged complaints. First, the city conducted a timely independent investigation. Second, employee's disagreement with the investigator's methods or conclusions, or the number of interviews conducted, will not support a retaliation claim.

***Ammons v. Brantley Cnty. Bd. of Comm'rs*, No. 5:16-CV-78, 2017 WL 498718 (S.D. Ga. Feb. 6, 2017)**

Employee, an emergency dispatcher, alleged that defendants, a county board of commissioners and employee's direct supervisor, had retaliated against her in violation of the FMLA when defendant supervisor gave her negative job references after agreeing, as part of a settlement agreement resolving employee's FMLA claims, to provide her with favorable job references. Defendants moved to dismiss the complaint, asserting that providing a job reference did not constitute an adverse employment action. The district court denied the motion to dismiss. The court, citing *Mitchell v. Mercedes-Benz U.S. Int'l, Inc.*, 637 Fed.Appx. 535, 539-40 (11th Cir. 2015) (*per curiam*), noted that providing negative job references May constitute an adverse employment action where providing such references is motivated by unlawful retaliatory intent.

Summarized elsewhere:
***Vincent v. Coll. of the Mainland*, 703 F. App'x 233 (5th Cir. 2017)**

***Feliciano v. Coca-Cola Refreshments USA, Inc.*, No. CV 17-942, ___ F. Supp. 3d ___, 2017 WL 6391474 (E.D. Pa. Dec. 13, 2017)**

***Turner v. Ala. Gulf Coast Ry. LLC*, No. CV 15-0440-MJ-C, 2017 WL 6559916 (S.D. Ala. Dec. 22, 2017)**

***Shann v. Atlantic Health Sys.*, No. CV124822ESMAH, 2017 WL 5260780 (D.N.J. Nov. 13, 2017)**

***Sanchez v. City of Pembroke Pines, Fla.*, No. 16-CV-62958, 2017 WL 5068370 (S.D. Fla. Nov. 3, 2017)**

***Greene v. Railcrew Express, LLC*, No. 4:16-CV-747-SNLJ, 2017 WL 4339509 (E.D. Mo. Sept. 29, 2017)**

***Mejia v. Roma Cleaning, Inc.*, No. 15-cv-4353 (SJF) (GRB), 2017 WL 4233035 (E.D.N.Y. Sept. 25, 2017)**

***Dearden v. GlaxoSmithKline LLC*, No. 15 Civ. 7628, 2017 WL 4084049 (S.D.N.Y. Sept. 14, 2017)**

***Mullins v. Healthsource Saginaw, Inc.*, No. 16-cv-11283, 2017 WL 3034628 (E.D. Mich. July 18, 2017)**

***Groening v. Glen Lake Cmty. Schs.*, No. 1:15-CV-1068, 2017 WL 2772362 (W.D. Mich. June 27, 2017)**

***Brown v. Excelda Mfg. Co., Inc.*, No. 15-CV-13349, 2017 WL 2351738 (E.D. Mich. May 31, 2017)**

***Cronk v. Dolgencorp, LLC*, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)**

***Grimes-Jenkins v. Consol. Edison Co. of N.Y., Inc.*, No. 16 Civ. 4897 (AT) (JCF), 2017 WL 2258374 (S.D.N.Y. May 22, 2017)**

***Walker v. City of Pocatello*, No. 4:15-CV-00498-BLW, 2017 WL 1650014 (D. Idaho May 1, 2017)**

***Ejiogu v. Grand Manor Nursing & Rehab. Ctr.*, No. 15CV505 (DLC), 2017 WL 1322174 (S.D.N.Y. Apr. 5, 2017)**

***Payton v. Aerotek Inc*, No. 15-12222, 2017 WL 1164522 (E.D. Mich. Mar. 29, 2017)**

***Turner v. N.J. State Police*, No. 08-5163 (KM) (JBC), 2017 WL 1190917 (D.N.J. Mar. 29, 2017)**

***Dulany v. Brennan*, No. 16-CV-149-JHP-FHM, 2017 WL 991070 (N.D. Okla. Mar. 14, 2017)**

c. Causal Connection

***Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158 (2d Cir. 2017)+B16**

Employee worked as a substance abuse counselor for employer, START, a nonprofit clinic that provides treatment services to narcotics-addicted patients. Employee suffered from severe anemia and had to undergo a number of hospital stays for which she requested FMLA leave. After returning to work, employee was terminated. Employee claimed her termination was due to FMLA retaliation but employer contended it fired employee for failing to maintain documentation procedures that were necessary for the company to maintain its state certification and to bill insurance companies.

A New York district court held that employee lost on all of her claims under the FMLA and she appealed. On appeal, employee challenged the district court's jury instruction on the appropriate causation standard to be applied to FMLA retaliation claims. Employee claimed the

district court erroneously instructed that the "but for" causation applies to FMLA retaliation claims. The Second Circuit Court of Appeals agreed with employee and deferred to the Labor Department's regulation implementing a "negative factor" causation standard for FMLA retaliation claims.

***Germanowski v. Harris*, 854 F.3d 68 (1st Cir. 2017)**

Employee Heidi Germanowski brought suit against former employer, alleging violations of the FMLA. The district court granted employer's motion to dismiss for failure to state a claim, and employee appealed. Employee worked as a First Assistant Register for the Berkshire Middle District Registry of Deeds (the Registry) under her longtime friend Patricia Harris. During the year after Harris became employee's supervisor, employee expressed symptoms of anxiety such as fatigue and hair loss, for which she sought medical attention. In September 2014, employee was diagnosed with anxiety disorder and informed Harris that she was seeking medical care. In October 2014, employee had a nervous breakdown that required her to miss three weeks of work. In February 2015, employee's psychiatrist gave her a letter advising her to take a leave of absence in order to pursue further treatment of her disorder. Employee did not, however, provide this letter to anyone at the Registry and no one at the Registry otherwise obtained it. The day after this letter was given to employee, she received a voicemail from the chief court officer stating that she was terminated effective immediately.

The court of appeals held that employee's allegations were insufficient to state a claim for FMLA retaliation. The *prima facie* case for retaliation under FMLA § 105 has three elements that employee needs to establish: (1) that she availed herself of a protected FMLA right; (2) that she was adversely affected by an employment decision; and (3) that there was a causal connection between her protected conduct and the adverse employment action. Employee must specifically reference either the qualifying reasoning for leave or the need for FMLA leave, which the court noted employee did not do. Employee simply stated that she was sick, which would not have given employer reason to believe this situation fell under the FMLA. Additionally, while employee was adversely affected by her termination, the court ultimately reasoned that employee failed to show that Harris knew or had reason to know at the time of employee's termination that employee intended to take FMLA-protected leave, thereby not meeting the causal connection requirement. Therefore, the court affirmed the district court's decision.

***Utter v. Colclazier*, No. 17-7002, __ F. App'x __, 2017 WL 5125552 (10th Cir. Nov. 6, 2017)**

Employee worked as a temporary teacher for the Seminole, Oklahoma school system. While employed, she was granted intermitted FMLA leave to care for her son. At the end of the 2014-15 school year, employee was recommended for rehire for the upcoming school year. However, a school board member voiced his opposition to her rehiring and claimed that she "was late every day." The school board ultimately voted not to rehire employee.

Employee brought several claims, including an FMLA retaliation claim. The lower court dismissed the claim, which was affirmed by the United States Court of Appeals for the Tenth Circuit. In doing so, the appeals court noted that it was undisputed that employee had taken FMLA qualifying leave and that at least one school board member had voted against her for coming to work late due to the leave. However, the appeals court found that employee provided no evidence that any school board member was aware that employee was late for an FMLA

reason. Lacking evidence that the school board action was motivated by the exercise of FMLA rights, due to an absence of knowledge of the exercise of such rights, a retaliation claim cannot arise. The court concluded that, while interference claims may survive without such knowledge, retaliation claims require evidence of retaliatory or discriminatory intent.

Wilson v. Gaston Cnty., N.C., 685 F. App'x 193 (4th Cir. 2017)

Employee alleged that she was terminated in retaliation for requesting medical leave for cancer treatment. The district court granted employers' motion for summary judgment and employee appealed. Employee asserted that employer held her to a higher standard and disciplined her more frequently than other employees when she returned from medical leave and leading up to her termination.

The court rejected employee's assertions that she was disciplined and held to a higher standard because employee did not receive her first infraction until a year after her return from medical leave. In addition, employers showed that other employees were subject to more scrutiny than employee. Therefore, the court determined the infractions on employee's record could not be casually connected to employee's request for medical leave. Thus, the court affirmed the district court's summary judgment and dismissed employee's claims.

Branham v. Delta Airlines, 678 F. App'x 702 (10th Cir. 2017)

Employee, a flight attendant, sued employer, an airline, for interfering with her rights under the FMLA. The trial court dismissed her claim on summary judgment, which the Tenth Circuit subsequently affirmed. There was no evidence that employee's termination related to her exercise or attempted exercise of FMLA rights. Rather, employer fired employee for violating a notice-of-absence policy. Employee, who was then on final warning and had previously exceeded the maximum amount of absences, failed to give the required notice for an absence. And because she could be terminated for any reason under the final warning, employer suspended and eventually terminated her employment. That her reason for the absence would have qualified her for FMLA leave did not matter. Also, employee's FMLA-leave request, which she made after being suspended, was not a shield. Employer's termination reason – violation of policy – was not related to the exercise of any FMLA rights. When the need for leave is unforeseeable, an employee must still follow the usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. So, "an employer generally does not violate the FMLA if it terminates an employee for failing to comply with a policy requiring notice of absences, *even if the absences that the employee failed to report were protected by the FMLA*."

In addition, employer did not violate its notice obligations under the FMLA. If an employer is on notice that an employee might qualify for FMLA benefits, it must notify the employee that FMLA coverage May apply. Moreover, when an employee seeks potentially-FMLA-qualifying leave for the first time, employee does not have to assert the FMLA or even mention it. Employee, however, never gave enough information to trigger employer's notice duty. As the court explained, calling in sick without more is not sufficient notice. Likewise, employee calling to say that she must care for her sick mother was too vague. Even if she had triggered employer's notice duty, she would not have been prejudiced, as required for relief under the FMLA. Because employee previously requested and received FMLA leave, she already knew her rights. And besides, any such notice would not have changed that employer

fired employee for a reason that was not related to the FMLA. Nor would it have mattered if it was employee's first request. Employer would have fired employee for a reason unrelated to the FMLA regardless of employee exercising any rights under the FMLA.

***Williams v. ABM Parking Servs., Inc.*, No. 1:16CV1259, __ F. Supp. 3d __, 2017 WL 4999562 (E.D. Va. Oct. 31, 2017)**

Employee worked for a parking service provider at a major airport in dispatcher and supervisor roles for approximately 15 years. In April 2014, he suffered a stroke that required him to take leave. He returned to work two months later, then he suffered a second stroke in December 2014. He then took medical leave from February until May of 2015. After May 2015, he worked four days a week in a shuttle bus supervisor position and was allowed to do so despite no longer holding a commercial driver's license or department of transportation card that permitted him to drive the shuttle busses. The employer acquired the parking service provider in August 2015 and informed all of the parking service provider's employees that they would need to reapply for positions with employer. Employee reapplied, and employer's HR director informed him that he was no longer eligible for his position because he no longer had a commercial driver's license or department of transportation card. Employer then refused to rehire him.

Employee filed an FMLA retaliation claim against employer, and employer moved for summary judgment on the ground that employee could not show that employer knew that employee had previously taken FMLA leave. The court disagreed, finding that a reasonable jury could infer that employer's decisionmakers were aware of employee's previous FMLA leave because employer's operations manager knew that employee had taken FMLA leave and had been involved in hiring recommendations and discussions with the HR director who ultimately made the hiring decision. Accordingly, the court denied employer's request for summary judgment.

***Charles v. Air Enters., LLC*, 244 F. Supp. 3d 657 (N.D. Ohio 2017)**

Employee, a manager and long term employee, filed suit against his employer, Air Enterprises, LLC alleging that his termination as part of a January, 2015 reduction in force was in retaliation for his request for FMLA leave in October 2014. The Northern District of Ohio district court granted employer's motion for summary judgment. Employee argued that the two affidavits submitted with his opposition, evidence that his supervisor told him that unscheduled leave would be "a problem" and that he was not originally included in the original January 2015 layoff, were sufficient to present a "conflict of material fact" pursuant to Rule 56. The court disagreed, finding that employee could not meet his burden of establishing the required causal connection.

The court found that employer demonstrated that employee was laid off as part of a reduction in force and not in retaliation for his FMLA request. The court found employer's evidence credible. First, many employees had requested FMLA leave without adverse employment action, including employee who had requested and used FMLA leave multiple times throughout his employment. Further, employees were laid off who had never requested or used FMLA leave. Employer also produced evidence of cost cutting measures including that other managers and executives were laid off; thirty-eight positions were eliminated in four rounds of lay-offs; and employee's position was eliminated and he was not replaced. The court

found one of employee's submitted declarations inadmissible hearsay and that employee's own affidavit was not credible. Citing Sixth Circuit precedent, the court found that the contradiction between employee's prior sworn deposition testimony that his manager told him that it was "no problem" to take the time off and his proffered affidavit claiming the opposite occurred violated the established rule that "a party May not create an issue of fact by submitting an affidavit to oppose summary judgment that contradicts prior sworn deposition testimony." *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 459 (6th Cir. 1986). Employee has filed an appeal.

***Valtierra v. Medtronic Inc.*, 232 F. Supp. 3d 1117 (D. Ariz. 2017)**

A district court in Arizona granted employer's motion for summary judgment. Employee utilized FMLA leave from August to December 2013 on the basis of his obesity, which he stated was causing him joint and knee pain. After taking the leave, employee returned to work in the same position he had before his leave, at the same rate of pay and on the same shift. Employee was later terminated for falsification of company records after admitting to signing off on completed work he did not complete. Employee alleged employer interfered with his ability to take leave under the FMLA.

Summary judgment was granted on the FMLA claim on the basis that there was no triable issue of fact regarding whether FMLA leave was impermissibly considered as a factor in the discharge. Employer noted that after employee returned to work following his FMLA leave, he did not request any additional leave, did not request any vacation days or time off for medical procedures, did not schedule any surgery or have any other imminent or upcoming events that would qualify for FMLA leave and did not fill out any FMLA paper work for a qualifying event. The court concluded that no reasonably juror could conclude that employer used employee's taking of FMLA leave in 2013 as a negative factor when it made its decision to termination employee in July 2014.

***Lavorgna v. Norfolk S. Corp.*, No. 2:16-cv-00491, 2017 WL 5006430 (W.D. Pa. Oct. 31, 2017)**

An employee brought suit alleging retaliation under the FMLA. The employee train conductor worked for an employer for several years, during which time he qualified for and took FMLA leave for more than five years. Each year, he submitted his FMLA leave application to a third party company, which managed FMLA requests on behalf of the employer. One year, the employee failed to complete all of the required sections of the certification form. When the third party company notified the employee about the incomplete sections, the employee failed to timely cure; instead, he submitted an amended application, in which he had falsified sections that his healthcare provider was supposed to complete. The third party company discovered the falsification and alerted the employer about the falsified form. The employer investigated the matter and ultimately terminated the employee for having falsified information on the FMLA application, thereby violating the employer's employee policies. Until the investigation, the employer's management had not been aware of the employee's medical condition.

The district court granted summary judgment in favor of the employer. The employee failed to establish the causation element of the *prima facie* case for retaliation. The record showed that the employer was supportive of the employee's taking FMLA leave for five years, had never demonstrated a pattern of antagonism toward the employee, and had conducted a normal investigation and disciplinary hearing. The temporal proximity (approximately two

weeks) between the submission of the FMLA application and the employee's termination did not, by itself, raise an inference of causation.

***Thompson v. Kessler Inst. for Rehab., Inc.*, No. 15-5533, 2017 WL 3784036 (D.N.J. Aug. 31, 2017)**

Employee, a Rehabilitation Assistant, brought suit against his former employer alleging that he was discharged in retaliation for taking leave under the FMLA. In May 2013, employee took FMLA leave after tearing a ligament in his hand. Employer required employees on FMLA leave to update it on the status of their condition every two weeks. Employer terminated employee in November 2013, claiming employee abandoned his job when he failed to provide a status update within the two week requirement. Employee, however, claims he called employer's Leave Coordinator every two weeks with a status update, and that his leave was extended when the Leave Coordinator told him "[w]hen you are ready to come to work, let me know."

On summary judgment, employer argued that employee could not show a causal nexus between the exercise of his protected FMLA rights and its decision to terminate employee's employment and not re-hire him. The court, without explanation, disagreed.

The court also found there were questions of fact with regard to employer's claimed legitimate reason for employee's termination, job abandonment. The fact issues included: (1) whether employee stayed in contact with employer's Leave Coordinator throughout his leave; (2) whether employer's Leave Coordinator told him "[w]hen you are ready to come to work, let me know"; (3) whether such a statement constituted an extension of employee's leave; and (4) whether employee received a letter from employer telling him he would be terminated if he did not notify his supervisors of his intentions regarding his FMLA leave. The court denied summary judgment for employer finding that these questions of fact touched directly on the issue of whether employee abandoned his job.

***Walker v. Verizon Pa., LLC*, No. 15-4031, 2017 WL 3675384 (E.D. Pa. Aug. 25, 2017)**

Employee brought an FMLA retaliation claim against her employer after she was terminated in a company-wide reduction in force. After a five-day trial, the jury returned a verdict for employee on her FMLA and other claims. After the trial, employer moved for a renewed judgment as a matter of law, among other post-trial motions.

In selecting employees for layoff, employer ranked potential candidates using a scoring metric that focused on a variety of factors. Evidence showed that employee's supervisors agreed orally to terminate her and to make sure the scoring results would match their decision. There was also evidence that her supervisors ignored criteria for other employees that, if applied, would have resulted in those employees receiving a lower score than employee. And, the supervisors penalized employee for a poor performance review while she was on FMLA leave.

On employer's renewed motion for judgment as a matter of law, it argued that employee could not establish a causal connection that suggested a link between her FMLA leave and termination. Employer argued that employee could only prove a causal connection by producing evidence of a temporal connection between her termination and FMLA leave or showing a history of ongoing antagonism. The court noted, however, that where the temporal proximity of

the action is not unduly suggestive of retaliation, other evidence when looked at in its entirety May be sufficient to raise the inference of retaliation and establish a causal connection.

In denying employer's motion the court found that sufficient evidence existed for a reasonable jury to determine employee's termination was causally connected to her FMLA leave, including the evidence surrounding employee's poor 2013 mid-year review due to her FMLA leave; that her 2013 review was a factor in her termination; and another employee who did not take FMLA leave was not deducted points under the scoring metric as required that would have made him the lowest scoring employee, subjecting him and not employee to termination. The court found it was reasonable for the jury to find that her supervisor contrived the rankings to justify his preconceived decision to terminate employee because of her FMLA leave.

Furthermore, because employee pursued a mixed-motive theory on her retaliation claim, she was only required to prove that her taking FMLA leave was a motivating factor in her termination, not the only factor.

***Eichbauer v. Henry Ford Health Sys.*, No. 16-cv-11404, 2017 WL 3642185 (E.D. Mich. Aug. 24, 2017)**

Employee, a certified registered nurse, brought suit against the hospital where he formerly worked, alleging FMLA interference and retaliations claims. Employee was granted FMLA leave and additional time off following knee surgery. While employee was on leave, his supervisor called him to see how he was feeling and to verify how long he would be out on leave. She also required him to provide a doctor's note verifying the dates of his leave. Following employee's return to work, co-workers observed employee engaging in abnormal behavior. During a meeting with his supervisor, employee appeared flushed, anxious, and antsy, which led his supervisor to report the behavior to human resources. Employee was required to undergo a drug test. Meanwhile, employer audited employee's narcotics documentation, which revealed numerous discrepancies. Eventually, the drug test returned positive results, and employee was terminated.

Employee alleged that the phone call while he was out on leave amounted to interference with his rights under the FMLA, but a Michigan district court disagreed. As the court explained, the single phone call did not disrupt or discourage employee from taking leave. Therefore, it was not actionable interference. Employee also alleged that he was terminated in retaliation for taking FMLA leave, but the court also rejected this claim, finding insufficient evidence to establish that there was a causal connection between employee's FMLA leave, which began on July 25, 2014, and his eventual termination, which occurred on December 17, 2014. According to the court, this four-month lapse in time was not sufficient, on its own, to create an inference of retaliation. Nor had employee established any other evidence of retaliation. To the contrary, the evidence indicated that employee was terminated after his positive drug test and the results of the audit revealed a discrepancy in his narcotics documentation. Accordingly, the court granted employer's motion for summary judgment as to both claims.

***Fabian v. St Mary's Med. Ctr.*, No. 16-4741, 2017 WL 3494219 (E.D. Pa. Aug. 11, 2017)**

Employee sued former employer, claiming that employer retaliated against her in violation of the FMLA by failing to place her back onto the work schedule when she returned from leave and eventually removing her from the work schedule completely. Employee also

asserted a "pattern or practice" claim and sought damages for, among other things, compensatory, emotional distress, and punitive damages, as well as damages for physical pain and suffering.

A district court in Pennsylvania granted in part and denied in part employer's motion to dismiss. The court began by rejecting employer's argument that employee had not sufficiently pled a causal connection between the alleged adverse action and her request for leave. To the contrary, the court explained, employee established the requisite causal connection through timing alone – she began her leave in July 2015 and was cleared to return to work on July 29, but she was not placed back onto the work schedule despite her medical clearance. The court also found that employee adequately alleged a pattern of antagonism between her use of leave and the alleged adverse action, insofar as her supervisor failed to return her messages and ignored employee's attempts to contact her about returning to work. On the other hand, the court concluded that employee had not adequately pled a pattern or practice claim because she failed to identify any other similarly situated employees. Likewise, the court struck employee's requests for compensatory, emotional distress, punitive, and pain and suffering damages because those types of damages are not available under the FMLA. Instead, the remedies set forth in 29 U.S.C. § 2617 are the exclusive remedies available for violations of the FMLA.

***Walter v. Guitar Ctr. Stores, Inc.*, No. 5:16-cv-459-JMH, 2017 WL 3260521 (E.D. Ky. July 31, 2017)**

Employee brought suit against employer and a purported "superior" for violations of the Kentucky Civil Rights Act, Intentional Infliction of Emotional Distress, and Negligent Hiring and Retention, and sought to leave to amend to include retaliation in violation of the FMLA. Employers argued that employee's claim was futile because he could not establish a causal connection between exercise of rights under the FMLA and adverse employment action. Employers successfully argued that employee's placement on a performance improvement plan did not constitute adverse employment action, however employee prevailed in arguing that his eventual constructive discharge did constitute adverse employment action. The court held that employee alleged sufficient facts to state a retaliation claim under the FMLA, and granted him leave to amend his complaint to include the claim.

***Mullins v. Healthsource Saginaw, Inc.*, No. 16-cv-11283, 2017 WL 3034628 (E.D. Mich. July 18, 2017)**

Employee, a billing clerk at a hospital, was allegedly assaulted at work by a co-worker. The day after the assault, employee requested and was approved for FMLA leave due to the stress and anxiety caused by the assault. About two weeks after going on FMLA leave, employee tendered her notice of intent to retire as well as a completed discrimination/harassment/disruptive grievance form to her employer. Employee never returned to work. Employee sued employer for retaliation under the FMLA, claiming that employer's failure to adequately address the alleged assault caused her to not return to work. The court granted summary judgment for employer, holding that there was no evidence employer had any discriminatory animus toward employee or intended to force her to retire. The court found that since employee never returned to the workplace after going on leave, there was no way for her to gauge whether employer was taking adequate steps to address her grievance.

***Hughes v. Inova Health Care Servs.*, No. 1:16-CV-674, 2017 WL 2785420 (E.D. Va. June 26, 2017)**

Employee was a pathologists' assistant who sued Inova Health Care Services, a nonprofit healthcare system, for allegedly retaliating against her in violation of the FMLA. Employee asserted that employer wrote her up on multiple occasions, audited her work, instituted a Performance Improvement Plan against her, gave her negative performance evaluations, and fired her because her back spasms prevented her from working for long intervals of time and required her to take intermittent FMLA leave. Employer moved for summary judgment on the basis that employee had not established a causal connection between the adverse employment actions against her and her use of FMLA leave. The Eastern District Court of Virginia agreed and granted employer's motion for summary judgment.

Employee could not show that the adverse employment actions were causally connected to her use of FMLA leave because she was not terminated until six months after she requested and began receiving medical leave, and employer accommodated each of her requests for accommodation over a period of eighteen months. Employer custom built employee a foot rest, approved her request for stretch breaks, limited the time she spent standing, and curtailed the hours she worked. Employer also ordered and installed a new workstation for employee that met her exact specifications. Furthermore, employer had legitimate, non-retaliatory reasons for terminating employee. Employee repeatedly disposed chemicals and tissue samples improperly and gave inaccurate descriptions of specimens. The pathologists she assisted complained about her work. She received low scores on her performance reviews. She also made three separate errors that risked losing clinical information and delayed patient care. Employee did not offer any evidence under the *McDonnell Douglas* framework suggesting that these reasons were pretextual. As such, employee could not establish a claim for retaliation under the FMLA.

***Troiano v. Cnty. of Allegheny*, No. CV 16-595, 2017 WL 1406901 (W.D. Pa. Apr. 20, 2017)**

A county employee sued employer county for retaliation and interference under the FMLA, and employer moved to dismiss both claims. With respect to the FMLA retaliation claim, employer argued that employee could not establish the requisite causal connection between the exercise of his FMLA rights and the alleged adverse employment action. The court disagreed, finding the following allegations sufficient at the pleading stage: (1) employee requested and was granted leave and was forced to resign; (2) employer chastised other employees for taking time off work and made numerous remarks to employee about missed work; and (3) there was a short period of time between when employee exercised his FMLA rights and when he was forced to resign. With respect to the FMLA interference claim, the court agreed with employer that employee had failed to state a claim because he failed to allege that he was denied leave to which he was entitled.

***Edmonds v. Gestamp Chattanooga LLC*, No. 1:15-CV-65, 2017 WL 1380553 (E.D. Tenn. Apr. 17, 2017)**

Employee, a parts maker, filed suit against Gestamp Chattanooga, LLC, a manufacturer and assembler of automotive parts and its parent company, Gestamp North America, Inc., for claims of interference and retaliation under the FMLA. During his employment, employee suffered a work-related injury to his right shoulder. He filed a workers' compensation claim and was placed on work restrictions by a physician. Employee was assigned to light-duty work as a

label maker, where he printed labels and stuck them on containers, and later to the press area, where he was required to lift heavy objects and use both arms. Employee complained that his duties in the press area caused him pain but his work responsibilities were never modified. While still on light-duty work, employee missed work three times and left work early three times due to shoulder pain. As a result, he received six attendance points based on employer's attendance policy. The sixth attendance point was assessed because employee missed work on a Saturday. However, employee asserted that employer did not allow employees on work restrictions to work overtime, and working on a Saturday constituted working overtime.

A few days later, employee was demoted from the first shift to the second shift. The next day, employee requested FMLA leave because he needed time to rest his shoulders and because he was feeling sick. Employer's human resources generalist informed employee that he did not qualify for FMLA leave. Three days later, employee was diagnosed with acute sinusitis and pharyngitis. His doctor provided employee with a return-to-work form allowing him to return to work four days later. Employee notified two different supervisors via voicemail that he would be absent from work due to his illnesses on two separate days. Employer contended that employee did not provide notice of his absences. Two days before employee was scheduled to return to work based on his physician's recommendation, employer notified employee that it had terminated his employment for violation of its two-day no-call, no show policy.

Defendants moved for summary judgment as to all of employee's claims. The district court in Tennessee entered summary judgment in favor of the parent company because it argued that it was not employee's employer and employee conceded that dismissal of the claims against it was appropriate.

Regarding the FMLA interference claim, employer argued that employee was not entitled to benefits under the FMLA. However, the district court found that because an employee working on light-duty restrictions is eligible for FMLA leave, employer interfered with his FMLA rights by telling him that he was not eligible for FMLA leave. The district court also found that if employee had left a voicemail regarding his acute sinusitis and pharyngitis, employer's obligation to notify employee of his FMLA rights would have been triggered and it was a dispute of fact whether employee left those voicemails or not.

Regarding the FMLA retaliation claim, the district court found that there was sufficient evidence of a causal connection between employee's exercise of protected activity and his termination because of the proximity in time, complaints that his modified duty caused him pain, and demotion to second shift. The district court also found that there was a disputed issue of fact regarding pretext because it would be inappropriate for it to apply the honestly held belief rule to find that employer honestly believed employee had violated the two-day no-call, no-show policy on summary judgment.

Morgan v. Ball Metal Beverage Container Corp., No. 4:15CV69, 2017 WL 1282895 (N.D. Ind. Apr. 6, 2017)

Employee worked for employer as a Maintenance Supervisor from 2007 until his termination on 11/25/14. He brought suit against employer, claiming it fired him because he suffered from diabetes, took FMLA leave, and requested an accommodation in April 2014. Employer contended it had terminated employee because of ongoing performance deficiencies. From 2010 on, employee had received multiple warnings pertaining to poor leadership, safety

violations, and failure to ensure that tasks were completed on time. In 2012, his attendance declined significantly. Employee confided to Freddy Spencer, his supervisor, and Paula Thoennes, the human resources manager, that he had diabetes, and complications with this condition had caused some of the absences. Thoennes informed employee of his potential eligibility for FMLA leave. Employee then applied for and received intermittent FMLA leave in 2012, 2013, and 2014.

In April 2014, employee requested and received medical leave for a medical condition related to his diabetes. On returning from leave, he asked to wear a walking boot with an open toe for six to seven weeks. Because of this specialized footwear, he was not allowed to go out on the production floor. In May 2014, he took a vacation. While he was gone, Spencer discovered that the maintenance room was in disarray, the tool room was disorganized, and various maintenance department projects had fallen behind schedule. His co-workers could not perform their work because employee had failed to order parts for them or leave a list of projects they could complete during his vacation. Even though he had been working in the maintenance office, not out on the floor, employee could have completed his work. In June 2014, employee received a written warning. In September 2010, he took another vacation, and Spencer again noticed deficiencies with his performance. On November 25, 2014, Thoennes and Spencer terminated employee's employment.

To prove an FMLA retaliation claim, employee must prove (1) he engaged in a protected activity; (2) employer took an adverse employment action against him; and (3) there is a causal connection between the protected activity and the adverse employment action. In support of his claim, employee offered evidence that, in April and May 2014, Spencer had called him "flipper," "gimpy," and "big foot" while he was wearing the walking boot. The court rejected this argument. ("[I]solated comments are not probative of discrimination unless they are 'contemporaneous with the discharge or causally related to the discharge decision-making process.'" *Fleishman v. Cont'l Cas. Co.*, 698 F.3d 598, 605 (7th Cir. 2012).) Employee also asserted that employer had a pattern or practice of terminating employees following a medical leave. But the employees he cited were not similarly situated, and one of the employees had taken a medical leave but not been terminated. The court granted employer's motion for summary judgment.

***Payton v. Aerotek Inc*, No. 15-12222, 2017 WL 1164522 (E.D. Mich. Mar. 29, 2017)**

Employee brought suit alleging retaliation and interference in violation of the FMLA. She alleged that one employer, an insurance company, at which the employee was hired for temporary employment, retaliated against her for taking pregnancy-related FMLA leave. Prior to her FMLA leave, the insurance company placed the employee on a performance improvement plan, due to quality issues. While the employee was on her FMLA leave, the insurance company terminated her. She alleged that the other employer, a staffing agency, interfered with her job in violation of the FMLA, under a joint employer theory, by not restoring her to the same or similar job position following her termination.

The district court granted summary judgment for the defendants. First, the court held that the employee failed to establish the causation prong of her *prima facie* case for retaliation. The insurance company had a legitimate, non-pretextual reason to terminate, considering the evidence of the employee's performance problems. Second, the court held that the employee's employment with the staffing agency was directly linked to her assignment with the insurance

company. Since the insurance company was the one with the power to hire or terminate the employee, the staffing agency did not engage in an adverse action against the employee. Therefore, the staffing agency cannot be held liable for the insurance company's decision to terminate.

***Oberthien v. CRST Logistics, Inc.*, No. 15-CV-128-LRR, 2017 WL 1128603 (N.D. Iowa Mar. 24, 2017)**

Employee brought suit against employer, alleging discrimination in violation of the FMLA. During his employment, the employee began taking FMLA leave to care for his cancer-stricken daughter. The employer provided 480 hours of FMLA leave to the employee to use intermittently, as the need arose. When the employee used up this initial allotment, the employer provided an additional 80 hours of leave time, in order for the employee to reach the date at which his FMLA eligibility would reset. However, the employee's failure to timely notify his supervisor of his absences and his frequent tardiness, sometimes for reasons unrelated to his daughter's medical treatment, drew formal and informal disciplinary action from his employer. After one such incident involving tardiness and failure to timely notify, the employer issued a written disciplinary action to the employee and ultimately terminated him.

The district court granted the employer's motion for summary judgment. The court found the employee had failed to establish a genuine dispute regarding causation between his FMLA leave and his termination. The employer's affirmative extension of additional hours of leave time, the year-long length of the employee's unimpeded exercise of his FMLA rights, and the employer's decision to terminate the employee mere days after two undisputed instances of misconduct defeated the employee's causation prong. Further, the employee's recurring failure to timely notify his supervisor when he would be tardy or absent violated the employer's stated disciplinary policies, and, thus, was actionable.

***Peterson v. UH Reg'l Hosps.*, No. 1:15-CV-2670, 2017 WL 916421 (N.D. Ohio Mar. 7, 2017)**

Employee brought suit in the district court through which she claimed that she was discharged in retaliation for taking FMLA leave. The case comes before the court on employer's motion for summary judgment, which the court granted. Employee worked in an administrative position for employer, a health care system. Employee was absent from work for seven months, the first twelve weeks of which were FMLA leave. During the leave, employer restructured and eliminated a few positions, including that of employee. Upon employee's return from leave, she was given three months of paid time to find an alternate position. Employee did not do so and she was discharged. In granting summary judgment, the court briefly noted that employee submitted no evidence of a retaliatory motivation, but only stated her "belief" that she thought her leave of absence May be related to her discharge.

***Coia v. Vanguard*, No. CV 16-3579, 2017 WL 724334 (E.D. Pa. Feb. 23, 2017)**

A district court in Pennsylvania granted employer's motion for summary judgment. Employee suffered from depression and, in 2013, was diagnosed with borderline personality disorder. Employee periodically utilized intermittent FMLA leave to leave work to attend doctors' appointments. Her requests were never denied. Employee was terminated in November 2015 for violating employer's Professional Conduct and Fair Treatment Policies as

well as the conduct occurring after a formal warning. Employee alleged, *inter alia*, retaliation for utilizing FMLA.

Summary judgment was granted on the FMLA claim on the basis that there was no causal connection between the protected activity and the employment termination, because employer provided employee with all requested leave time and her termination was specific to violation of specific policies and multiple warnings.

***Townes v. Md. Dep't of Juvenile Servs.*, No. JKB-15-1093, 2017 WL 528389 (D. Md. Feb. 8, 2017)**

A district court in Maryland granted employer's motion for summary judgment. Employee claimed FMLA retaliation when she was issued a letter of reprimand as well as an unsatisfactory performance evaluation shortly after returning to work from her second leave of absence, which resulted in her inability to utilize sick leave from the State Employee' Leave Bank. The court found employee had not presented either direct or circumstantial evidence of an improper motive by the Department of retaliation. The court further determined that her inability to access the Leave Bank was caused by the state law making her ineligible to draw from the bank as long as he had unexhausted hours of leave. As a result, employee failed to establish the Department took an adverse employment action against her.

***Tillotson v. Manitowac Co., Inc.*, No. 15-CV-14479, 2017 WL 467404 (E.D. Mich. Feb. 3, 2017)**

Employee, a product sales manager, brought FMLA retaliation and interference claims against his former employer. On February 3, 2017, the court granted employer's motion for summary judgment. Employee then moved to alter or amend the judgment on his FMLA retaliation claim, arguing that the court improperly made factual determinations in resolving the motion for summary judgment. The court denied employee's motion.

Employee's position required frequent travel. He suffered from "dumping syndrome," which sometimes required him to use the bathroom up to eight times per day. Employee kept his condition a secret from employer for considerable time. Employee later informed a Human Resources employee about his condition and was instructed to document the medical condition and reach out to a third-party contractor utilized to handle applications for leaves of absence. The third-party informed employee that his request for leave would be approved pending medical certification that he was suffering from a serious medical condition. Employee's doctor submitted a certification recommending only work restrictions, and thus leave was denied. Employee and his employer jointly agreed that no immediate changes were needed to his work duties. In April 2015, employer considered employee for termination while there was a reduction in the work force, but he was not discharged. In November 2015, employee was discharged. The termination was based on a rubric employer uses to rank employees' performances and potential. Employee was ranked as the lowest product sales manager. The court inferred that the rubric was created prior to employee informing his employer of his request for a reduced schedule.

Employee argued that employer's failure to explain how he was ranked low on the rubric calls into question whether his determination was based on data or conjecture and that the court should have drawn inferences regarding the subjectivity of the rubric in his favor. The court held

that it reasonably accepted employee's explanation of how the rubric was relied upon because employee presented no evidence to contradict employer's assertions. The court acknowledges that even if it improperly inferred that the rubric was created after he requested a reduced schedule, employee still failed to show any genuine issue of fact regarding pretext and reiterates that it was employee's burden to rebut employer's assertion that he was discharged based on a nondiscriminatory rubric.

***Gardenhire v. Manville*, No. 15-cv-4914-DDC-KGS, 2017 WL 445506 (D. Kan. Feb. 2, 2017)**

Employee, an inspection packer, brought suit against his former employer alleging that employer failed to reasonably accommodate employee in violation of the ADA. Additionally, employee raised two claims under the FMLA. First, that employer retaliated against him when it fired him for exercising his FMLA rights. Second, that employer interfered with employee's right to reinstatement under the FMLA.

Applying the *McDonnell Douglas Corp. v. Green*, 411 U.S. 791 (1973) burden-shifting framework, the district court found that employee was not able to establish a *prima facie* case of FMLA retaliation because there was insufficient evidence to demonstrate a causal connection where nearly five months had expired between employee's protected activity and employer's adverse employment action. The court then determined that employer had a legitimate, nonretaliatory motive for ending employee's employment and granted summary judgment as to employee's retaliation claims. As to employee's interference claims the court again highlighted the five-month period between employee's FMLA leave and his termination finding (1) that employee was not entitled to reinstatement; (2) that employee's termination did not interfere with this right to be reinstated; and (3) that employee's termination was not related to his FMLA leave. Accordingly, the court granted summary judgment as to employee's interference claims.

***Wellein v. Wal-Mart Stores, Inc.*, No. 2:15-CV-00107-SMJ, 2017 WL 190094 (E.D. Wash. Jan. 17, 2017)**

A district court in Washington granted employer's motion for summary judgment. Employee requested FMLA leave on five separate occasions during his employment for various reasons. The last leave period was in 2012. He suffered no adverse employment consequences following his leave, although he asserted that managers made subtle insulting comments suggesting that he was manipulating the FMLA leave. Employee was terminated in November 2014 for reasons relating to performance and conduct. He claimed retaliation for taking FMLA leave. Summary judgment was granted to employer on the basis that there were no facts sufficient to suggest any connection between the use of FMLA and the termination. The court noted that he last took FMLA leave two years prior to his termination and the open door complaint he made about a manager was unrelated to the FMLA leave. Thus, he failed to make a *prima facie* showing of FMLA retaliation.

Summarized elsewhere:
***Mistler v. Worthington Armstrong Venture (WAVE)*, 697 F. App'x 201 (4th Cir. 2017)**

***Wells v. Retinovitreous Assoc., Ltd.*, 702 F. App'x 33 (3d Cir. 2017)**

***Storrs v. Univ. of Cincinnati*, No. 1:15-CV-136, __ F. Supp. 3d __, 2017 WL 4270516 (S.D. Ohio Sept. 26, 2017)**

Higgins v. Town of Concord, 246 F. Supp. 3d 502 (D. Mass. 2017)

Boyd v. Univ. of Detroit Mercy, No. 16-14375, 2017 WL 6610621 (E.D. Mich. Dec. 27, 2017)

Kaczmarek v. Cnty. of Lackawanna Transit Sys., No. 3:17-CV-00950, 2017 WL 5499160 (M.D. Pa. Nov. 16, 2017)

Gill v. Genpact, LLC, No. 1:17-CV-454(LMB/JFA), 2017 WL 5319938 (E.D. Va. Nov. 13, 2017)

Colonna v. UPMC Hamot & UPMC, No. 1:16-cv-0053 (BJR), 2017 WL 4235937 (W.D. Pa. Sept. 25, 2017)

Perkins v. Child Care Assoc., No. 4:16-CV-694-A, 2017 WL 3634607 (N.D. Tex. Aug. 22, 2017)

Worthington v. Chester Downs & Marina, LLC, No. 17-1360, 2017 WL 3457031 (E.D. Pa. Aug. 11, 2017)

Tuhey v. Ill. Tool Works, Inc., No. 17 C 3313, 2017 WL 3278941 (N.D. Ill. Aug. 2, 2017)

Tarrant v. Hamilton Twp. Sch. Dist., No. 16-7058 (FLW) (LHG), 2017 WL 3023211 (D.N.J. July 14, 2017)

Jones v. Maywood Melrose Park Broadview Sch. Dist. 89, No. 16-cv-09652, 2017 WL 2936709 (N.D. Ill. July 10, 2017)

Jackson v. La. Dep't of Pub. Safety & Corrs., No. 15-00490-JJB-RLB, 2017 WL 2786493 (M.D. La. June 27, 2017)

Mollet v. St Joseph's Hosp. Breese, No. 16-cv-0293-MJR-DGW, 2017 WL 2778656 (S.D. Ill. June 27, 2017)

Brown v. Excelda Mfg. Co., Inc., No. 15-CV-13349, 2017 WL 2351738 (E.D. Mich. May 31, 2017)

Cannon v. Univ. of Tenn., No. 3:15-CV-576, 2017 WL 2189565 (E.D. Tenn. May 17, 2017)

Valenzuela v. Bill Alexander Ford Lincoln Mercury Inc., No. CV-15-00665-PHX-DLR, 2017 WL 1326130 (D. Ariz. Apr. 11, 2017)

Wilson v. Dynasplint Sys., Inc., No. 3:14-CV-310, 2017 WL 1208848 (S.D. Ohio Apr. 3, 2017)

Moore v. Verizon Wireless (VAW), LLC, No. 5:14-CV-02230-SGC, 2017 WL 1196959 (N.D. Ala. Mar. 31, 2017)

Kortyna v. Lafayette Coll., No. CV 15-4625, 2017 WL 1134129 (E.D. Pa. Mar. 27, 2017)

Murphy v. McLane E., Inc., No. 3:16CV1055, 2017 WL 770653 (M.D. Pa. Feb. 28, 2017)

***Rodriguez v. Reston Hosp. Ctr., LLC*, No., 1:16-cv-623 (JCC/JFA), 2017 WL 772348 (E.D. Va. Feb. 28, 2017)**

***Alcozar-Murphy v. ASARCO Ariz. Inc.*, No. CV-14-2390-TUCDCB, 2017 WL 748626 (D. Ariz. Feb. 27, 2017)**

***Clarke v. Nw. Respiratory Servs., LLC*, No. A16-0620, 2017 WL 393890 (Minn. App. Jan. 30, 2017)**

i. Temporal Proximity

***Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261 (11th Cir. 2017)**

Employee brought suit under the FMLA, claiming that employer interfered with the exercise of his FMLA rights and later retaliated against him for asserting those rights. The district court in Florida granted summary judgment in favor of employer holding that Jones had failed to establish a *prima facie* case of either interference or retaliation under the FMLA. The Eleventh Circuit Court of Appeals affirmed the judgment with respect to employee's interference claim, but reversed the judgment with respect to his retaliation claim.

Employee argued that employer interfered with his right to take his FMLA leave by refusing to allow him to return to work with certain physical limitations, even though two other employees with different job functions had been allowed to do return to work. But the court noted that both of those employees, unlike employer, submitted fitness-for-duty certifications to employer before returning to work. The court further noted that the two employees were not proper comparators since employee's job was more physically demanding than that of the other two employees and their injuries were not as physically limiting. The court of appeals affirmed the district court's granting of summary judgment on employee's interference claim.

Employee further argued that employer retaliated against him for taking FMLA leave when it suspended and then terminated him, pointing to the timing between his return from FMLA leave and his termination to prove causation. The court clarified the law on the issue of temporal proximity setting forth how temporal proximity should be measured for purposes of establishing the causation prong of a *prima facie* case of retaliation under the FMLA. The court explained that temporal proximity should be measured from the last day of an employee's FMLA leave until the adverse employment action at issue occurs, rather than from the day that an employee commences FMLA leave. Based on this understanding of temporal proximity, the court held that employee met his burden of raising a genuine dispute as to whether his taking of FMLA leave and his termination were casually related, given that he was terminated less than one month after returning from his FMLA leave.

The court further noted that employer's comment that employee was being suspended for abusing and misusing FMLA leave is not evidence of retaliation, if employer can establish a good faith basis for believing that employee indeed abused such leave. However, the comments regarding corporate not liking the timing of his FMLA leave corroborates employee's claim that his FMLA leave and his termination were not wholly unrelated. Therefore, employee raised a genuine dispute of material fact with respect to the causation prong of a *prima facie* case for FMLA retaliation. Further, the court found that employer's contention that employee violated the company's social media policies by posting photos of himself vacationing while on leave, May serve as evidence of pretext given that employee was not informed that he was being

terminated for violating a company policy and it is not clear that employee's social media posts actually violated company policy. Therefore, viewing the facts in the light most favorable to employee, the court found that there was a genuine dispute of material facts with respect to whether employer's reasons for terminating employee were pretextual.

***Tiffany v. Dzwonczyk*, 696 F. App'x 7 (2d Cir. 2017)**

Employee, proceeding *pro se*, sued his former employer, a state agency, as well as former supervisors and co-workers under the FMLA and Title VII. Employee's FMLA claims were brought under a retaliation theory. The district court granted employer's unopposed motion to dismiss. On appeal, the Second Circuit summarily affirmed the district court's decision, determining that employee failed to allege sufficient facts to establish an inference of retaliatory intent. Specifically, the court held that employee, who returned from FMLA leave one year prior to his termination, could not rely on an inference of retaliatory intent based on temporal proximity because any adverse action was "too attenuated to establish a causal relationship between the protected activity and allegedly retaliatory action."

***Shelton v. Boeing Co.*, 702 F. App'x 567 (9th Cir. 2017)**

Employee appealed the district court's denial of his motion for partial summary judgment and grant of summary judgment in employer's favor. Employer terminated employee's employment for, among other things, failing to provide prior notice of FMLA-covered absences. In the end, the Ninth Circuit agreed with the trial court and affirmed its judgment.

Employers May not "interfere with, restrain, or deny" the right and benefits provided to employees under the FMLA. Further, to show interference, an employee must show that her taking of FMLA leave was a "negative factor" in her employer's decision to either deny her FMLA leave or take an adverse employment action against her. Importantly, an employer May discipline an employee for misconduct associated with FMLA leave if it would have imposed the same discipline had employee taken non-FMLA leave.

In employee's case, he was terminated for refusing to comply with his manager's instructions to contact her before taking any absence. Employee also failed to comply with his employer's known usual and customary policy for requesting leave when he disregarded his manager's instructions. But, employer did not terminate employee because he exercised his right to FMLA leave. The FMLA does not prohibit an employer from disciplining an employee for noncompliance with a company's usual and customer attendance policies. Moreover, employee did not provide any unusual circumstances to justify his noncompliance. That is, employee failed to show that anything outside his control prevented form following the policy, or that he was reasonable in disregarding his manager's clear and repeated instructions.

***Boggs v. Cedar Creek, LLC*, No. CIV-16-1481-C, 2017 WL 6503658 (W.D. Okla. Dec. 19, 2017)**

Employee worked as a human resources assistant for employer. On April 30, 2014, employee submitted a request for intermittent FMLA leave due to panic attacks she experienced while driving to work, particularly in inclement weather. On May 2, employer told employee it had approved her request for leave. In mid-2014, a written warning was given to employee for disregarding instructions. Employee had a number of other performance issues, such as making financial mistakes. Following a performance issue where employee unilaterally reassigned her

tasks to a new human resource employee, employer decided to terminate employee's employment effective September 15. Employee brought a complaint against employer for FMLA retaliation, and employer filed a motion for summary judgment.

Employee based her argument of causation on temporal proximity. The court stated that in the Tenth Circuit, an employee cannot rely on temporal proximity alone unless the employee's termination was very closely connected to the protected activity. Employee also alleged that when performing her payroll duties, she was required to deduct paid time off for herself and not for similar activities for other employees. The court said the temporal proximity of employee requesting leave was not very close to the termination and was intervened by undisputed performance issues unrelated to employee's health. Employer demonstrated a legitimate, non-discriminatory reason for terminating employee. The payroll deduction was not enough for employee to establish pretext, when the court considered events as a whole. The court granted employer's motion for summary judgment.

***Simons v. Boston Sci.*, No. CV 15-7519, 2017 WL 5951701 (D.N.J. Nov. 30, 2017)**

Employee worked for employer, a medical device company, as a sales manager. Employee was high-performing and won awards from employer for his sales performance. But employee had an alcohol problem that was increasingly affecting his performance. As a result of various displays of unprofessional behavior at business meetings, employee received a Written Corrective Action and, shortly thereafter, a Final Corrective Action. Employee was arrested for driving under the influence in a school zone. He did not tell his supervisor about the arrest but informed him that he would be taking FMLA leave. Employee checked into and completed a 30-day inpatient treatment program in California. The day before employee returned to work, in a phone call with the company investigator, who had been investigating employee's behavior, employee complained that his supervisor had been badmouthing him and that he had already relayed his concerns to the division president. The investigator spoke to the division president, who denied having conversed with employee and indicated that employee's fib made him seem "not trustworthy." Shortly after employee's return from FMLA leave, a meeting was scheduled with employee to discuss the results of the investigation. Just before the meeting, a criminal background check on employee revealed his recent DUI arrest. The investigator confronted employee, asking him what he had been doing the day he was arrested, and initially employee provided no information about the DUI arrest. Employee's two fibs, in combination with all his alcohol-fueled misbehavior, caused him to be terminated.

Employee brought suit against employer, claiming FMLA retaliation. The basis for his claim was temporal proximity: He was terminated three days after returning from FMLA leave. The court contended that employee had received his Final Corrective Action months before requesting FMLA leave, which warned employee that future instances of drinking on the job "May result in termination of employment." Employee claimed that employer displayed a pattern of antagonism against him, but his only evidence to support this claim was his false statement that employer had not investigated him for alcoholic behavior prior to his admission of alcoholism. Temporal proximity could not overcome employer's legitimate, non-discriminatory reasons for terminating his employment. The court granted employer's motion for summary judgment.

***Tanzarella v. Intertek Asset Integrity Mgmt., Inc.*, No. 1:17-cv-361, 2017 WL 4919178 (N.D. Ohio Oct. 31, 2017)**

Employee brought FMLA retaliation and interference claims against his former employer, an asset management company, for terminating him when he returned from FMLA leave. Employee was on FMLA leave due to side effects of a brain tumor. The court denied summary judgment on both claims.

With respect to the retaliation claim, employee argued that (1) there was a causal relationship between employee's FMLA leave and employer's decision to terminate him because employer terminated employee on the same day that employee's FMLA leave expired and less than three months after employee requested leave, and (2) conversations between employee and employer evidenced a retaliatory motive where employee's supervisor and employer's operations manager were upset that employee could not promise to be at work every day while being informed of employee's intent to take FMLA leave. Employee presented evidence that employer's proffered legitimate motive for terminating employee – there was no available work for his position in that office – had no basis in fact because there was work available for his position in other offices yet employer would not relocate employee despite its efforts to relocate other employees that did not invoke any FMLA rights. Based on this evidence, the court held that there was a genuine issue of fact as to whether employer terminated employee because he took FMLA leave, whether employer had a legitimate, non-discriminatory reason for the termination, and whether employer's purported reason for terminating employee was mere pretext.

With respect to the interference claim, the court held that employee's evidence created a material dispute of fact as to whether employer's proffered reason for his termination was a pretext, and thus would have occurred regardless of employee's decision to take FMLA leave.

Dzurka v. MidMichigan Med. Ctr.-Midland, No. 16-cv-11718, 2017 WL 4883561 (E.D. Mich. Oct. 30, 2017)

Employee, an assistant surgical technical at employer medical center, brought suit against employer after she was discharged for retaliation under the FMLA. Employer brought a motion for summary judgment, which was granted by the Eastern District Court of Michigan. The court held that employee could not establish the causation element of her *prima facie* case using temporal proximity, given the fact that employer learned of the protected activity over six months before terminating employee. Other than temporal proximity, the only evidence of causation that employee advanced was an email her supervisor sent asking why she was taking FMLA leave. However, considering that employee had been taking FMLA leave for years prior to the email and that employee herself stated that she believed her termination was not motivated by her use of FMLA leave but by her complaints about patient safety, the court held that the email was not sufficient to demonstrate causation. Thus, employee could not make a *prima facie* case of retaliation.

Rymas v. Princeton HealthCare Sys. Holding, Inc., No. 15-8188 (BRM) (LHG), 2017 WL 4858123 (D.N.J. Oct. 27, 2017)

Employee brought FMLA retaliation claims against her employer, a health care company. Employee was the Marketing and Design Manager. In January 2013, employee informed her employer that she was pregnant and that she intended to take all of her available days of leave. Around May 2013, employer denied employee's request for a modified schedule to work part-time from home. At the time, there was a staff shortage in the Marketing Department. While

employee was on maternity leave, employer was faced with cutting costs and decided to cancel a contract to develop a planning tool. Employee was the primary employee responsible for the information and data gathering related to the planning tool contract. As a result, the department director recommended that employee's position be eliminated due to her diminished responsibilities.

Employee returned to work on November 18, 2013 and alleges that she informed the department director that she was ready for additional work but was only assigned lower-level work. Employer denies this. On December 2, 2013, two weeks after employee returned to work, the department director emailed the Vice President of Marketing and Public Affairs that employee had called out three times in two weeks and appeared to be unstable. On January 6, 2014, employee was informed that her position was terminated due to budgetary and financial reasons and was unrelated to her performance.

The court granted summary judgment for employer. Employee argued that there was sufficient temporal proximity to support an inference of retaliation based on the fact that employer made the decision to terminate her less than two weeks after employee returned from FMLA leave. The court agreed that two weeks is sufficient temporal proximity to permit a reasonable jury to find that employee has raised an inference of retaliation and thus employee established a *prima facie* claim for retaliation under the FMLA. The court applied the burden-shifting framework articulated in *McDonnell Douglas* and held that employer proffered a nondiscriminatory basis for employee's termination, which employee could not demonstrate was a pretext for retaliation.

***Linderman v. Reading Truck Body, LLC*, No. 5:17-cv-01120, 2017 WL 4347615 (E.D. Pa. Sept. 29, 2017)**

Employee, a longtime employee, was approved for FMLA leave in April 2014. Employee's FMLA leave expired in October 2014, but he continued to experience pain related to his medical condition. Employer granted him additional leave through February 8, 2015. When employee returned to work on February 9, 2015, his co-worker called him a "fat lazy [expletive]," and continued to use this insult everyday even after employee complained to a supervisor. A few weeks later, on February 24, 2015, employee began experiencing pain related to a separate medical condition. Employee was out of work on an approved medical leave from February 26 through March 1. Employee worked a partial day on March 3, and was again out on an approved medical leave of absence from March 3 through March 8. On March 8, employee's doctor recommended he take an additional four weeks off from work. Employee did not contact employer again until March 12, when he discussed his need for leave, but did not receive approval from employer. On March 22, 2015, employee was terminated for failing to report off from work after March 8, 2015. Employee brought suit, alleging retaliation under the FMLA, and employer filed a motion to dismiss, arguing that employee failed to state a claim for FMLA retaliation. The court granted employer's motion to dismiss, finding that the five months that passed from employee's return from FMLA and his termination was too attenuated to establish the causation necessary to state a FMLA retaliation claim. The court also found that the co-worker's repeated insult and employer's failure to address the insult was not sufficient to establish causation.

***Saller v. QVC, Inc.*, No. 15-2279, 2017 WL 4347661 (E.D. Pa. Sept. 29, 2017)**

Employee worked as a buyer for employer for several years prior to her termination. During her employment, she was diagnosed with arthritis in both hands. She underwent two surgeries and was often absent from work due to medical appointments and physical therapies. The employer did not offer her FMLA leave for her surgeries or other absences, but employer provided her with the time off that she requested and restored her to her position after each leave of absence. In 2012 and 2013, employee engaged in several instances of insubordinate and unprofessional conduct and was ultimately put on a performance improvement plan as a result. In early 2014, employee received inconsistent performance ratings – one rating indicated that she was a poor performer and the other indicated that she had met expectations. In mid-February 2014, employee requested leave in order to undergo a third hand surgery in April 2014. The employer did not provide employee with any information regarding her FMLA rights. Employee was terminated on March 13, 2014, a month after her request for leave. Employee underwent surgery in early April. Employee filed suit, alleging interference and discrimination under the FMLA, along with claims under the ADA. Employee moved for summary judgment on her interference claim, and employer moved for summary judgment as to all of employee's claims. The court denied employee's partial motion for summary judgment, and denied employer's motion for summary judgment as to employee's FMLA claims.

Employee alleged four theories of liability in support of her interference claim: (1) that employer failed to notify her of her FMLA rights; (2) that employer failed to properly designate her leave as FMLA leave; (3) employer failed to adjust employee's workload in accordance with her medical needs; and (4) employer terminated employee's employment soon after her request for leave for a third surgery. The court rejected employee's first and second theories of liability, finding that while employer had failed to provide employee with information regarding her rights and responsibilities under the FMLA, employee had been provided with all needed leave and thus had experienced no prejudice. The court also rejected employee's third theory, noting that it was not supported by any FMLA regulation and appeared to be a recasting of employee's ADA claim. Finally, the court agreed that employee had stated sufficient evidence for a factfinder to decide whether she was terminated because of her third request for FMLA-qualifying leave. The court similarly noted that a factual issue existed as to employee's discrimination claim because of the very close timing between employee's request and her subsequent termination.

***Teenier v. Charter Commc'ns, LLC*, No. 16-cv-13226, 2017 WL 3704382 (E.D. Mich. Aug. 28, 2017)**

In granting employer's motion for summary judgment on an FMLA discrimination claim, the court found that employee failed to show by a preponderance of the evidence that employer's proffered reason for termination of employment was pretextual and that the termination resulted from retaliation for exercising FMLA rights. Mere proximity in time between the exercise of FMLA rights and the termination is insufficient on its own to establish such pretext.

A manager brought suit against his former employer Charter Communications, alleging employer retaliated against him for exercising his rights under the FMLA. Employee was terminated approximately one week after returning from FMLA leave. The district court granted employer's motion for summary judgment because employee's claim relied entirely on temporal proximity without sufficient additional evidence establishing pretext. First, employer's proffered reason for terminating employee was based on interviews with two other employees that it found

credible. An employer's reason for terminating an employee does not have to be correct, so long as there is some factual support for the decision. Second, the court could not find any statements in the record suggesting that employee's termination had anything to do with taking FMLA leave. To the contrary, employee acknowledged that his supervisor encouraged to take time off when his father was ill and when he passed away. Finally, as four other employees were terminated on the same day as employee, for the same reasons, the court found no evidence that employee was treated differently than similarly-situated employees who did not take FMLA leave.

***Perkins v. Child Care Assoc.*, No. 4:16-CV-694-A, 2017 WL 3634607 (N.D. Tex. Aug. 22, 2017)**

Employee brought suit against employer for interference with FMLA rights and retaliation under the FMLA. Employer brought a motion for summary judgment. The district court granted the motion for summary judgment.

Employee, a teacher, requested FMLA leave several times between August 2011 and October 2013. Each request was granted and employee returned to the same position when she returned from each leave. In June 2014, employer received a complaint that employee had engaged in misconduct, including shaking a child and encouraging children to fight each other. The complaint resulted in a visit by the Texas Department of Family and Protective Services; employee was terminated the same day.

Employer brought a motion for summary judgment, asserting that there was no evidence of interference with FMLA rights. Employer further asserted that employee could not establish a *prima facie* case of retaliation because there was no evidence of any causal connection between her FMLA leave and her termination, which occurred eight months after she last took leave. Employee argued that she had indicated she intended to take FMLA leave in the future for breast reconstructive surgery. The district court concluded that this could not support a claim that she requested future FMLA leave in compliance with employer's usual and customary notice procedures, particularly in light of employee's prior requests through the usual notice procedures. Thus, the court concluded that employer was entitled to summary judgment on employee's interference claim.

The court also rejected employee's retaliation claim on the basis that employee had not made a *prima facie* showing that her termination had any causal connection to her FMLA leave. The court explained that the eight months between employee's last FMLA leave and her termination was insufficient to establish causality, noting that the Eighth Circuit had found even shorter periods of time to be insufficient. Accordingly, the court found that employee failed to establish temporal proximity or other evidence of a causal link and granted employer's motion for summary judgment on the retaliation claim.

***Roys v. Upper Iowa Univ.*, No. 16-CV-2046-KEM, 2017 WL 3574441 (N.D. Iowa Aug. 17, 2017)**

In granting employer's motion for summary judgment on an FMLA discrimination claim, the court found that excessive absences and performance deficiencies were basis for termination such that the fact that employee was terminated in close temporal proximity to exercise of FMLA rights was insufficient to demonstrate discrimination.

A former employee brought FMLA claims against her former employer, a university, for entitlement and discrimination. Employee alleged employer had a discriminatory intent when it terminated after she returned from FMLA leave. The district court granted employer's motion for summary judgment on the grounds that it had a legitimate, nondiscriminatory reason for terminating employee, and because employee was unable to establish that employer's stated reasons were pretextual. Employee abandoned the entitlement claim.

The purported reason employee was terminated was "poor performance." Employee did not dispute that, since returning from FMLA leave on July 27, 2015, she failed to perform some of her duties, missed at least one meeting, and was slow in responding to FBI background checks. However, employee argued that the temporal proximity of her termination to her FMLA leave, employer's alleged failure to follow the procedures set forth in employee handbook, and the fact that she absented work upon her return from FMLA leave with the same frequency as before all suggest discriminatory pretext. The district court rejected each of these arguments. To prove pretext based on temporary proximity, without other evidence, the protected activity and termination must be closer in time than one or two months. Nearly all events employee cited occurred more than one month after she returned from FMLA leave. Further, the court found no evidence that employer deviated from its usual application of employee handbook. Finally, the court found that employee's absences after she returned from FMLA leave impacted her work to a greater degree than they did before her leave. For example, employee was put on a "performance improvement plan" that she was unable to satisfy because of several absences, which impacted students and faculty that relied on her.

***Worthington v. Chester Downs & Marina, LLC*, No. 17-1360, 2017 WL 3457031 (E.D. Pa. Aug. 11, 2017)**

Employee, a dealer at a casino, brought an FMLA retaliation claim against employer after being terminated three weeks into a six-month medical leave of absence. Employee requested the leave of absence after another employee shoved him causing him to suffer a serious shoulder injury. Employer filed a motion to dismiss for failure to state a claim.

Employer first argued that employee was not an eligible employee under the FMLA. The court was unpersuaded finding that employee clearly was an eligible employee because he was granted FMLA leave.

Employer also argued that the three-week gap between employee's FMLA request and his termination did not establish the temporal proximity necessary to establish a causal connection. Specifically, it argued that the three weeks between employee's request and his termination was not "unduly suggestive" of retaliation. And, employee did not allege any other facts in his complaint that would tend to show a causal connection, such as negative comments from decision makers, a culture against FMLA leave, or a pattern of antagonism against FMLA leave requests or to employee personally. Employee argued that courts in the Third Circuit had not yet set a bright-line rule as to how close in time the alleged protected activity and adverse action must be to be "unduly suggestive" of retaliation, and that three weeks was sufficiently proximate to state his claim.

The court was not willing to conclude, as a matter of law, that the three weeks between employee's commencement of his FMLA leave and termination was insufficiently proximate such that it could not be "unduly suggestive" of retaliation. As such, the court found employee

sufficiently pled the causal connection element of his FMLA retaliation claim, and denied employer's motion to dismiss.

***Fernandez v. Woodhull Med. & Mental Health Ctr.*, No. 14-CV-4191 (MKB), 2017 WL 3432037 (E.D.N.Y. Aug. 8, 2017)**

Employee filed suit claiming that he was demoted and then terminated for exercising his rights under the FMLA, among other claims. Prior to employee's taking leave under the FMLA, and other non-FMLA leave, complaints had been made against employee, including complaints that he had created a hostile work environment. Employee also made complaints about purported violations of federal, state and local laws. After returning from his FMLA and non-FMLA leave, employee was reassigned. Employer alleged that, following the reassignment, there were continued problems with employee's performance and attendance, and he was terminated. The draft termination paperwork contained a statement that it was unfortunate that employee had to go out on medical leave. An executive directed that the sentence regarding employee's FMLA leave be removed because it could be perceived as discriminatory.

The district court granted employer's motion for summary judgment. The district court found that employee had stated a *prima facie* case for retaliation under the FMLA based on the temporal proximity between the FMLA leave and the transfer (but not the termination). However, employer demonstrated legitimate, non-discriminatory reasons for the transfer, and employee was unable to establish pretext. (Notably, the district court found that no reasonable person could draw a negative inference from the comments in the draft memorandum as they were merely prefatory language setting forth time frames and context.)

***Harris v. City of Lewisburg*, No. 1:15-cv-00114, 2017 WL 3237780 (M.D. Tenn. July 31, 2017)**

Employee sued for retaliation, among other things, after he was terminated shortly after returning from a FMLA leave. The district court found that a reasonable jury could conclude that employee would not have been terminated 'but for' taking FMLA lave based on temporal proximity," and that the stated reasons for his termination were pretext for retaliation. This conclusion was reached, in part, because the employer deviated from its progressive discipline policy. "'Evidence that the progressive-discipline policy was not uniformly applied is evidence of pretext.'" (Citations omitted).

***Sawa v. RDG-GCS Joint Ventures III*, No. 15-6585, 2017 WL 3033996 (E.D. Pa. July 14, 2017)**

Employees sued employer for retaliation under the FMLA. Specifically, employees claimed that employer fired them for using approved FMLA leave. For a *prima facie* case of FMLA retaliation, an employee must show that: (1) she invoked her right to FMLA-qualifying leave; (2) she suffered an adverse employment decision, and (3) the adverse action was causally related to her invocation of rights.

The only disputed element in the cases for both employees was whether there was a causal connection between employees' respective invocations of FMLA leave and employer's decision to terminate them. Employees tried to satisfy causation based on temporal proximity alone. Employees argued that the short amount of time between the time they took FMLA leave and when they were terminated sufficed. The court, however, explained that the "degree of

suggestiveness of the time span depends on the particular facts of the situation." Further, the suggestiveness of temporal proximity can be diminished by the facts surrounding termination.

In employees' case, the suggestiveness of the temporal proximity between their use of FMLA leave and their terminations was diminished by the fact that the bases for their terminations were independently discovered in close proximity to each of their termination dates. Moreover, the individuals who decided to terminate employees were not aware that either employee had recently taken FMLA leave when they made the decisions to terminate them. The court thus granted employer's motion for summary judgment and dismissed employees' FMLA claims.

Coleman v. Caritas, No. 16-3652, 2017 WL 2423794 (E.D. Pa. June 2, 2017)

Employee suffered from digestive issues requiring him to take intermittent FMLA leave. He approached his supervisor and requested leave, to which his supervisor responded: "you need to come to work to get the shifts you want." The supervisor subsequently denied shift requests related to FMLA leaves, noted to employee that "he missed a lot of work" and ultimately terminated him allegedly for "dropped calls." Employee brought an FMLA retaliation claim among other claims and employer filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

The motion to dismiss as to the retaliation claim under the FMLA was denied. Both parties agreed that employee had invoked his right to FMLA leave and was terminated. In dispute was whether employee's employment had been terminated as a result of his exercise of FMLA rights. Based upon the fact that he was terminated two days after taking FMLA leave, the court found this short period "unduly suggestive" of an inference of causality. Based upon that temporal proximity and the prior comments by his supervisor that he had to come to work to get the shifts he wanted, the court found an inference of causality sufficient to overcome a motion to dismiss.

Fisk v. Mid Coast Presbyterian Church, No. 2:16-cv-00490-JDL, 2017 WL 1755950 (D. Me. May 4, 2017)

A former employee of Mid Coast Presbyterian Church, brought suit against multiple employers including the church and his former supervisors for events stemming from the termination of his employment. Among the claims in the complaint, employee alleged unlawful retaliation, asserting that he was unlawfully terminated because he exercised his right to medical leave under the FMLA. Employers filed a motion to dismiss the claims. In determining whether employee had established a claim for unlawful retaliation under the FMLA, the court concluded that employee had not shown that there was any causal connection between his taking of medical leave and his termination of employment. The only factual allegation in the complaint related to the "causation" requirement was that he was terminated two months after taking leave. However, the court held that temporal proximity, alone, is not sufficient to support an inference of causation. Therefore, the court dismissed the FMLA claim.

Smith v. Fla. Parishes Juvenile Justice Comm'n, No. CV 15-6972, 2017 WL 1177905 (E.D. La. Mar. 30, 2017)

Employee brought FMLA retaliation and interference claims against her former employer, the Florida Parishes Juvenile Detention Center and the Florida Parishes Juvenile

Justice Commission. The court granted summary judgment on both claims. Employee admits to sending a pornographic slideshow and other pornographic videos and images to her personal email and two other recipients from her work-issued cell phone and/or personal email. The pornographic material appeared on employer's server. When confronted, employee refused to resign but the misconduct was documented and she was disciplined – employer confiscated her work cell phone and suspended her access to the network. Moreover, the upper management group decided that it was best to minimize contact with employee to avoid confrontation.

Employee applied for FMLA leave on October 31, 2014 and submitted an FMLA certification form to employer on November 19, 2014. Employer did not deny her request but asked for a second medical opinion before approving it – a right, the court notes, that is expressly granted by the FMLA. Employer subsequently withdrew its request for a second opinion and granted the leave request. Thus, the court held that employee's interference claims fails as a matter of law because employer never denied her the benefits to which she was entitled under the FMLA.

With respect to employee's retaliation claim, the court held that employee failed to produce any evidence to create a material fact issue that a causal link exists between her taking FMLA leave and employer's action. The only allegedly retaliatory actions that employer imposed are the same actions that employer imposed *before* employee took FMLA leave: (1) interim disciplinary measures based on her admitted violations of employer's policies, and (2) the upper level managers' avoidance of direct contact with her. Because the disciplinary conduct occurred before employee requested FMLA leave and continued unchanged when she returned from leave, the court held that employee cannot demonstrate any causal link between her taking leave and the disciplinary actions. The court also reasoned that employee failed to provide any evidence of any disputed fact issue concerning whether she was subject to a materially adverse employment action because she has failed to show that she was constructively discharged: she voluntarily resigned after only two months of post-FMLA-leave managers' conduct and there is no evidence that the lack of contact made her job objectively worse.

***Flynn v. Fidelity Nat'l Mgmt. Servs., LLC*, No. 6:16-CV-87-ORL-40TBS, 2017 WL 1155399 (M.D. Fla. Mar. 28, 2017)**

Employee brought suit against her employer for FMLA retaliation and interference. Employee worked for her employer for fifteen years without discipline. Employee alleged her employer retaliated against her when it disciplined her after she exercised her FMLA rights and then terminated her employment five days after she requested to switch her FMLA leave from intermittent to continuous. Employee also alleged her employer intefered with her FMLA leave when it terminated her employment before she fully completed her previously approved FMLA leave. Employer moved for summary judgment on both claims. Employer argued employee's retaliation claim failed because she could not establish a *prima facie* case of retaliation or prove that its legitimate, non-retaliatory reason for taking adverse action against employee was pretext for retaliation. Employer also argued employee's interference claim failed because employee did not provide it with sufficient notice of her need for continuous leave and it would have fired her regardless of her need for FMLA leave due to her poor work performance.

The court denied employer's motion for summary judgment on both claims. The court reasoned that employee established all the elements of a *prima facie* case for FMLA retaliation and interference. The court held a rational jury could conclude that employer's reasons for

termination were prextextual because it was not until she exercised her FMLA rights that employer disciplined her for the first time in her fifteen year career. Futhermore, each time employee engaged in a protected act, employer took an adverse action against her. Notably, all of employer's adverse actions took place less than three months after employee engaged in protected activity. Therefore, employer was not entitled to summary judgment.

***Ashby v. Amscan, Inc.*, No. 3:15-CV-00643-GNS, 2017 WL 939324 (W.D. Ky. Mar. 9, 2017)**

Employee worked as a machinist for employer between April 2010 to April 2015. She took two FMLA leaves while employed by employer. Her first leave began in May 2014 and her second in March 2015. Employer had approved four weeks of FMLA time for her second leave. At the end of that leave, she requested two more weeks of FMLA leave, which she took. Employee returned from her second FMLA leave in late April 2015, and was notified that she was terminated because she had exceeded her 12-week FMLA allotment. While employer did give employee notice as to how much FMLA time she exhausted in February 2015, at no time did employer notify how much leave she had remaining before taking March 2015 leave or that her final two weeks of leave would exceed her 12-week FMLA entitlement. Employee sued employer for retaliation and interference under the FMLA. The court granted employer's motion for summary judgment on employee's retaliation claim, but denied it as to her interference theory.

At issue in employee's first claim was whether she could prove a causal link between the taking of her two FMLA leaves and her termination. Employee contended that the temporal proximity between those leaves and her discharge established a *prima facie* case of retaliation. In evaluating this argument, the court explained that temporal proximity is judged from the date when employer learned that employee exercised her FMLA rights, and not when her FMLA leave expired. Measured against this standard, the court ruled that employee could not make out a *prima facie* case as to her first leave, explaining that the 11 month period between that leave and her termination was insufficient as a matter of law to support retaliation. Employee, however, met her *prima facie* case burden as to her second leave because there was only a several week interval between that leave and her termination. Employer met its burden in articulating a legitimate non-discriminatory reason by stating that it fired employee for exceeding her FMLA leave entitlement. As to pretext, employee again relied solely on her temporal proximity argument. Because this alone is insufficient to meet her burden at the pretext stage, summary judgment was proper.

The court ruled that summary judgment was not appropriate for employee's interference claim, reasoning that employer's failure to advise employee of her FMLA rights led to her termination. Because employer failed to apprise employee with respect to how much of her 12-week FMLA allotment remained, she could not make an informed choice on when to return. The court rejected employer's argument that employee failed to file written request for two weeks more FMLA leave because her verbal request provided employer with sufficient information to conclude that an FMLA-qualifying event occurred. It was also unpersuaded that employee did not suffer prejudice due to the lack of FMLA notice on grounds that employee could have requested an earlier date to return to work. It also noted that employer did not offer any evidence that employee would not have been able to return to work upon the expiration of her FMLA leave. The fact that employer provided employee a tally of how much leave she had taken in February 2015 was not dispositive since employee created a triable issue by claiming that she did

not realize that employer's use of a rolling method for calculating FMLA leave would include the leave she took in 2014.

***Ferren v. Foulke Mgmt. Corp.*, No. CV 15-3721 (RMB/AMD), 2017 WL 634511 (D.N.J. Feb. 16, 2017)**

Employee was employed for 13 years as a lot attendant at a car dealership by a management company, and took FMLA leave for shoulder surgery. One week before employee was scheduled to return to work, he met with his supervisor about returning and provided him with a doctor's note with restrictions. His supervisor told him to go home and get better. On the date employee was to return to work, he was laid off. Although there was a history of layoffs at that time of year, employee had never been laid off in his 13 years of employment. Defendants contend that because another employee had been performing his and employee's jobs while employee was on FMLA leave, defendants determined they could save costs by laying off employee and having the other employee continue to do both jobs. The New Jersey district court held that the timing of laying off employee on the day he was to return to work was "unduly" or "unusually" suggestive at the summary judgment stage. Moreover, during the meeting the week prior to employee's return, his supervisor told employee to go home and get better in anticipation of employee's return to work the following week, despite that the other employee had been performing employee's job the entire time employee had been out. Additionally, employee defendants retained to perform employee's job had never taken FMLA leave, and employee had never before taken FMLA leave and was never before laid off during the slow season. These evidence in addition to the temporal proximity of the layoff created an issue for resolution by the jury.

***Brown v. Vanguard Grp., Inc.*, No. CV 16-946, 2017 WL 412802 (E.D. Pa. Jan. 30, 2017)**

Employee sued her employer for FMLA retaliation. But before trial, the court found that there was no link between any protected activity and adverse action. Therefore, the court granted employer's motion for summary judgment.

An employee must show a causal connection between some protected activity and an adverse action, explained the court. Such a connection can be demonstrated by an "unusually suggestive temporal proximity between the protected conduct and the adverse action or a pattern of antagonism coupled with timing." Of course, an unusually suggestive temporal proximately is not necessary. Courts will still look at the evidence as a whole, including evidence of intervening antagonism, to find an inference of discrimination. That being so, the Third Circuit recognizes that the inference of a causal link does not arise when the reason for adverse action pre-dates the protected activity.

In employee's case, employer took adverse action against employee within weeks of her protected activity. This adverse action, however, was for poor performance that pre-dated employee's protected activity. Employee knew that employer was not satisfied with her performance before she engaged in any protected activity. So, her long history of performance issues undermined the claim that temporal proximity showed an inference of discrimination. Because employee did not show a causal connection between her protected activity and the alleged adverse action, the court granted employer's motion and dismissed employee's claim.

***Sewell v. Strayer Univ.*, No. CV PWG-16-159, 2017 WL 57212 (D. Md. Jan. 5, 2017)**

Former Dean and Adjunct Professor filed, *inter alia*, a claim of FMLA retaliation. The district court granted employer's motion to dismiss. It found that most of the allegations were barred by *res judicata* as they had been raised by employee in a prior suit against the university, and those that were not raised, including the FMLA retaliation claim, could have been. The court also determined that employee's claim that failed applications for three positions also constituted FMLA retaliation did not state a claim upon which relief could be granted when the sole allegation supporting that claim was employee's exercise of FMLA rights some four and a half years before she applied for the positions.

***McCrea v. City of Dubuque*, 899 N.W.2d 739 (Iowa App. 2017)**

Employee brought an FMLA retaliation claim against her former employer, employer City of Dubuque. After a bench trial, the Iowa District Court for Dubuque County dismissed employee's claim because it found no causal connection between employee's FMLA leave and her termination. Employee appealed. The Court of Appeals of Iowa affirmed the district court's decision.

On appeal, employee alleged that employer terminated her because she took FMLA leave two months prior to her termination. The court compared employee's allegation to the facts in *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012). In *Sisk*, employee's only evidence of a link between her leave and termination was "the temporal proximity." *Id*. The Eighth Circuit determined that the two months between employee's FMLA leave and termination was insufficient to establish a *prima facie* case. *Id.* Here, the court ruled that employee's allegation was insufficient to establish a *prima facie* case. Because employee had no other evidence to connect her FMLA leave to her termination, her claim failed.

Summarized elsewhere:
***Mullendore v. City of Belding*, 872 F.3d 322 (6th Cir. 2017)**

***Tibbs v. Admin. Office of the Ill. Courts*, 860 F.3d 502 (7th Cir. 2017)**

***DePaula v. Easter Seals El Mirador*, 859 F.3d 957 (10th Cir. 2017)**

***Cooley v. E. Tenn. Human Res. Agency, Inc.*, No. 17-5355, __ F. App'x __, 2017 WL 6547387 (6th Cir. Dec. 22, 2017)**

***Elliot-Leach v. N.Y.C. Dep't of Educ.*, No. 16-3098-cv, __ F. App'x __, 2017 WL 4071121 (2d Cir. Sept. 14, 2017)**

***Clark v. Philadelphia Hous. Auth.*, 701 F. App'x 113 (3d Cir. 2017)**

***Diamond v. Hospice of Fla. Keys, Inc.*, 677 F. App'x 586 (11th Cir. 2017)**

***Duncan v. Chester Cnty. Hosp.*, 677 F. App'x 58 (3d Cir. 2017)**

***Offor v. Mercy Med. Ctr.*, 676 F. App'x 51 (2d Cir. 2017)**

***Hartman v. Lafourche Parish Hosp.*, 262 F. Supp. 3d 391 (E.D. La. 2017)**

DeCicco v. Mid-Atl. Healthcare, LLC, No. 14-2933, ___ F. Supp. 3d ___, 2017 WL 3189034 (E.D. Pa. July 27, 2017)

Reyer v. St. Francis Country House, 243 F. Supp. 3d 573 (E.D. Pa. 2017)

Smith v. Millennium Rail, Inc., 241 F. Supp. 3d 1183 (D. Kan. 2017)

Wevodau v. Commonwealth of Pa., 227 F. Supp. 3d 404 (M.D. Pa. 2017)

Pecora v. ADP, LLC, 232 F. Supp. 3d 1213 (M.D. Fla. 2017)

Davis v. Kimbel Mech. Sys., Inc., No. 5:16-CV-5194, ___ F.R.D. ___, 2017 WL 4810707 (W.D. Ark. Oct. 25, 2017)

Hodnett v. Chardam Gear Co., No. 16-10619, 2017 WL 6621527 (E.D. Mich. Dec. 28, 2017)

Sommerville v. Schenker, Inc., No. 2:16-CV-10765, 2017 WL 6621529 (E.D. Mich. Dec. 28, 2017)

Boyd v. Univ. of Detroit Mercy, No. 16-14375, 2017 WL 6610621 (E.D. Mich. Dec. 27, 2017)

Witbeck v. Equip. Tr., LLC, No. 1:17-CV-0498, 2017 WL 6606906 (M.D. Pa. Dec. 27, 2017)

Percell v. Commw. of Ky. Dep't of Military, No. 3:16-CV-721-TBR-LLK, 2017 WL 6347973 (W.D. Ky. Dec. 12, 2017)

Nekich v. Wis. Cent. Ltd., No. 16-CV-2399 (JNE/DTS), 2017 WL 5591600 (D. Minn. Nov. 17, 2017)

Clark v. Sw. Airlines Co., No. 1:16-CV-910-RP, 2017 WL 4853794 (W.D. Tex. Oct. 26, 2017)

Lenoir v. SGS N. Am., Inc., No. 1:16-CV-58-SA-DAS, 2017 WL 4158625 (N.D. Miss. Sept. 18, 2017)

Dearden v. GlaxoSmithKline LLC, No. 15 Civ. 7628, 2017 WL 4084049 (S.D.N.Y. Sept. 14, 2017)

Walker v. Verizon Pa., LLC, No. 15-4031, 2017 WL 3675384 (E.D. Pa. Aug. 25, 2017)

Tuhey v. Ill. Tool Works, Inc., No. 17 C 3313, 2017 WL 3278941 (N.D. Ill. Aug. 2, 2017)

Tarrant v. Hamilton Twp. Sch. Dist., No. 16-7058 (FLW) (LHG), 2017 WL 3023211 (D.N.J. July 14, 2017)

Brown v. Excelda Mfg. Co., Inc., No. 15-CV-13349, 2017 WL 2351738 (E.D. Mich. May 31, 2017)

Marrin v. Capital Health Sys., Inc., No. 14-2558 (FLW) (LHG), 2017 WL 2369910 (D.N.J. May 31, 2017)

Cronk v. Dolgencorp, LLC, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)

***Keys v. Monument Chem. Ky., LLC*, No. 3:15-cv-645-DJH, 2017 WL 2196751 (W.D. Ky. May 18, 2017)**

***Cannon v. Univ. of Tenn.*, No. 3:15-CV-576, 2017 WL 2189565 (E.D. Tenn. May 17, 2017)**

***Godwin v. Corizon Health*, No. 16-00041-B, 2017 WL 1362033 (S.D. Ala. Apr. 10, 2017)**

***Alejandro v. N.Y. City Dep't of Educ.*, No. 15-CV-3346 (AJN), 2017 WL 1215756 (S.D.N.Y. Mar. 31, 2017)**

***Moore v. Verizon Wireless (VAW), LLC*, No. 5:14-CV-02230-SGC, 2017 WL 1196959 (N.D. Ala. Mar. 31, 2017)**

***Popko v. Penn State Milton S Hershey Med. Ctr.*, No. 1:13-CV-1845, 2017 WL 1078158 (M.D. Pa. Mar. 22, 2017)**

***Dulany v. Brennan*, No. 16-CV-149-JHP-FHM, 2017 WL 991070 (N.D. Okla. Mar. 14, 2017)**

***Meky v. Jetson Specialty Mktg. Servs., Inc.*, No. 16-CV-1020, 2017 WL 878235 (E.D. Pa. Mar. 6, 2017)**

***Rodriguez v. Reston Hosp. Ctr., LLC*, No., 1:16-cv-623 (JCC/JFA), 2017 WL 772348 (E.D. Va. Feb. 28, 2017)**

***Alcozar-Murphy v. ASARCO Ariz. Inc.*, No. CV-14-2390-TUCDCB, 2017 WL 748626 (D. Ariz. Feb. 27, 2017)**

***Reganato v. Appliance Replacement Inc.*, No. CV 15-6164 (RMB/JS), 2017 WL 747463 (D.N.J. Feb. 27, 2017)**

***Gardenhire v. Manville*, No. 15-cv-4914-DDC-KGS, 2017 WL 445506 (D. Kan. Feb. 2, 2017)**

***Dunlap v. United Outstanding Physicians*, No. 15-CV-14022, 2017 WL 395237 (E.D. Mich. Jan. 30, 2017)**

***Scales v. FedEx Ground Package Sys. Inc.*, No. 15 C 50038, 2017 WL 345576 (N.D. Ill. Jan. 24, 2017)**

***Laborde v. Mount Airy Casino*, No. 3:16-CV-769, 2017 WL 114085 (M.D. Pa. Jan. 11, 2017)**

***Hilbert v. Ohio Dep't of Transp.*, 84 N.E. 3d 301 (Ohio App. 2017)**

ii. Statements

Summarized elsewhere:
***Browett v. City of Reno*, 237 F. Supp. 3d 1040 (D. Nev. 2017)**

***Linderman v. Reading Truck Body, LLC*, No. 5:17-cv-01120, 2017 WL 4347615 (E.D. Pa. Sept. 29, 2017)**

***Lenoir v. SGS N. Am., Inc.*, No. 1:16-CV-58-SA-DAS, 2017 WL 4158625 (N.D. Miss. Sept. 18, 2017)**

2. Articulation of a Legitimate, Nondiscriminatory Reason

***Capps v. Mondelez Global, LLC*, 847 F.3d 144 (3d Cir. 2017)**

Employee brought suit against his former employer after he was terminated, alleging that employer interfered with his FMLA benefits and retaliated against him for taking FMLA leave. Employee had hip replacements, after which he was certified for intermittent FMLA leave. Employee called out of work for FMLA leave several days during the year. Employer later discovered that employee appeared to have taken FMLA absences during dates that he was arrested for a DUI and during court dates for the DUI arrest. Consequently, after conducting an investigation, employer terminated employee on the belief that he lied about several days he had called out of work for FMLA.

The district court granted summary judgment in favor of employer on employee's FMLA retaliation claim, which the Third Circuit affirmed. The court emphasized that FMLA retaliation claims require proof of employer's retaliatory intent. The court held that where an employer provides evidence that the reason for the adverse action taken by employer was an honest belief that employee was misusing FMLA leave, that is a legitimate, nondiscriminatory justification for the discharge. (In making this holding, the court noted that like the Seventh and Eighth Circuits, it explicitly declined to follow the Sixth Circuit's modified approach to the honest belief rule that requires the honest belief is also "reasonably based on particularized facts.") Thus, the court found that even assuming, *arguendo*, that employee could establish a *prima facie* case of FMLA retaliation, employer here met its burden of demonstrating a legitimate, nondiscriminatory justification for employee's discharge with evidence that employee was terminated for his misuse of FMLA leave and dishonesty surrounding such leave in violation of employer's policies. Furthermore, the court did not find evidence that any of employee's requests for FMLA leave were denied, that he was prohibited from returning to work after taking approved FMLA leave, or that there was any animus on the part of employer related to employee taking FMLA leave prior to receiving notice of the DUI arrest and conviction. There was also insufficient evidence to conclude employer's explanation was pretext. Thus, summary judgment on the retaliation claim was appropriate.

The court further affirmed summary judgment in favor of employer on employee's FMLA interference claim because he was unable to show he was denied a benefit to which he was entitled under the FMLA. The court rejected employee's argument that his termination amounted to a deprivation of benefits which constituted interference under the FMLA, noting that employee must show that FMLA benefits were actually withheld.

***Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299 (10th Cir. 2017)**

Employee, a customer service representative ("CSR") at a telephone service company, sued her employer for FMLA retaliation. The district court entered summary judgment for employer and employee appealed. Employee, an insulin dependent diabetic used FMLA leave intermittently for her diabetes, only when vacation days were not available because she believed her employer frowned upon employees using FMLA leave. A former manager testified that a CSR's use of FMLA leave negatively impacted the sales quotas of the sales manager, employees

who used leave were targeted, and employer looked for other reasons to terminate those employees. The former manager also testified employee was on the "target list," and identified the Center Support Manager ("CSM"), who was responsible for handling attendance, FMLA leave requests, and preparing separation proposals, as one manager who discussed terminating employees who took FMLA leave.

In performing her work, employee mistakenly failed to remove a service plan from an account after the customer canceled it. As a result, employee was suspended pending an inquiry and was ultimately put on a "last chance agreement" that noted even one incident of unsatisfactory performance May lead to discipline up to and including dismissal. Two months later, employee suffered a drop in blood sugar and experienced disorientation and confusion. When she noticed she was locked out of her computer, she contacted her first line supervisor to request assistance. Her first line supervisor, who had been monitoring employee's calls, instead informed the CSM that employee had hung up on two customers. The CSM responded by doing a dance and saying "I finally got that bitch." Employee's second line supervisor told the CSM her behavior was not appropriate. Later that day, the first line supervisor, CSM and a union steward met with employee regarding the dropped calls and employee stated she had experienced dangerously low blood sugars at the time of the calls and did not remember the calls. The first line supervisor told employee she was suspended pending an inquiry. At the inquiry, attended in person by employee's first and second line supervisors and the CSM, and attended via conference call by the third line supervisor, employee was given an opportunity to explain the dropped calls. Employee again explained she did not recall taking the calls due to a severe drop in blood sugar. The third line supervisor, taking into account that it took two separate actions to terminate a call, did not believe employee's excuse, and made the decision to terminate employee's employment. Because employee could not establish pretext for her employer's legitimate non-retaliatory reason (intentionally dropping two calls while under a last chance agreement) for her discharge, failed to show evidence that the CSM participated in the decision to discharge employee, and failed to show the decisionmaker shared the CSM's animus or was influenced by such animus, the Tenth Circuit affirmed the Kansas district court's order granting summary judgment to employer.

<u>Neal v. T-Mobile USA, Inc.</u>**<u>, 700 F. App'x 888 (11th Cir. 2017)</u>**

Employee, a T-Mobile store employee, alleged her employer fired her in retaliation for taking FMLA leave. The district court granted summary judgment in favor of her employer on the basis that employer provided a legitimate nonretaliatory reason for the termination, which employee failed to rebut as pretext.

Employer had submitted evidence that it terminated employee because she failed to comply with employer's policy, stated in employee handbook, requiring an employee to provide fitness for duty documentation from her health care provider releasing her to return to work prior to returning from a continuous FMLA leave. Employer had granted employee a leave of absence of over two months. During the leave, employer's third-party administrator notified employee that she would need to submit a return to work authorization at least three days prior to returning to work. After employer twice extended employee's return date and employee did not return, a human resources administrator notified employee that she must submit a release and return to work within the next three days or she would be considered to have voluntarily terminated her employment. Three days later, believing that employee had failed to submit a release, employer

terminated her employment. After the termination, employer learned the third-party administrator had misfiled employee's release form.

The court of appeal held that employee failed to create a genuine factual dispute regarding whether employer's proffered legitimate, nonretaliatory reason for termination was pretextual. The court rejected employee's argument that employer had constructive knowledge that her health care provider had faxed the release form, because employee told her store manager he had done so, stating that employee must demonstrate actual knowledge. The district manager who terminated employee's employment testified that he did not know about employee's statement or the facsimile before he decided to fire employee, and the court held that employer could not be held liable for basing the termination on a mistaken but honest belief. On these bases, the court affirmed the summary judgment.

***Bartels v. S. Motors of Savannah, Inc.*, 681 F. App'x 834 (11th Cir. 2017)**

Employee worked as a general manager for employer car dealership. In October 2012, employee took off several days to care for his wife, who was undergoing a difficult pregnancy. Later than month, employee, during an organization's preparation for a charity event at the dealership, used profanity and made demeaning comments to one of the charity's volunteers. The dealership terminated him and expressed sympathy for his wife's pregnancy, but cited business reasons for his dismissal. But in a notice it provided to the Georgia Department of Labor ("GDOL"), it gave that reason, employee's incident with the charity and other reasons for his firing. Employee sued employer for retaliation and interference under the FMLA. The Eleventh Circuit Court of Appeals affirmed the grant of summary judgment in employer's favor.

In evaluating employee's retaliation claim, the court assumed employee made out a *prima facie* case and that employer properly asserted a legitimate non-discriminatory reason for his discharge, which was his inappropriate behavior with charity's representative. For this reason, it proceeded to determine whether employee satisfied his burden at the pretext stage. While employer did provide the GDOL multiple reasons for dismissing employee, the court ruled that the one arising out of the charity event was included in its GDOL notice and that, in any event, employee failed to show that employer shifted its reasons in terminating him. The court was also unimpressed by employer's expressions of sympathy for his wife's pregnancy, explaining that constituted "weak evidence of discriminatory intent." Employee's reliance on comparator evidence was not relevant because they did not involve mistreatment of potential customers or third parties and thus were not sufficiently similar. The court rejected employee's "me too" evidence as to two employees on grounds that one admitted that he was fired for a legitimate reason and another's statement that employer told him to fire someone for an illegal reason was inadmissible hearsay. Finally, employee's view that his termination should warrant a mixed-motives analysis was meritless because it was clear that he was fired for a legitimate reason. It therefore affirmed the district court's order granting summary judgment on employee's retaliation claim.

The court also affirmed summary judgment on employee's interference theory. The court explained that, while employer bore the burden in showing that it had an independent reason to discharge employee despite his request for FMLA leave, employer could rely on the rationale it used at the pretext stage of employee's retaliation claim to show that employer had a legitimate reason in denying any request by employee for FMLA benefits. Because the court found that employer, at the pretext stage, had a legitimate basis in firing employee, this could also serve as

the basis for to support that it also had a non-discriminatory one with respect to his interference claim.

***Cooper v. D.C.*, No. 14-1526 (EGS), __ F. Supp. 3d __, 2017 WL 4355917 (D.D.C. Sept. 29, 2017)**

Employee filed suit after her employment was terminated, alleging a number of claims, including retaliation for protected activity under the FMLA. Her FMLA claim asserted that her termination and events leading up to it, including a "ten-point deduction from her job performance" more than two years before her termination, were done in retaliation for exercising her FMLA rights. On employer's motion for summary judgment, the court found that employer had presented legitimate performance-related reasons for employee's termination. The court further found that employee presented nothing on the record to establish that employer's reason was false and that her protected activities were the real reason. In fact, the court noted that employee's claims of pretext were based on "racial and age-based animus," not FMLA activity. Based on the record, the court granted employer's motion for summary judgment.

***Hill v. Branch Banking & Tr. Co.*, 264 F. Supp. 3d 1247 (N.D. Ala. 2017)**

After a leave of absence for gallbladder surgery, a bank teller brought suit against her former employer bank alleging, among other things, interference with FMLA rights and retaliation under the FMLA. The United States District Court for the Northern District of Alabama denied summary judgment as to the claims for FMLA interference and retaliation for exercising FMLA rights/requesting reasonable accommodations. As to the interference claim, the court found a triable issue as to whether employee's supervisor's inquiries about her return to work were designed to interfere and pressure her into taking less FMLA leave or were genuinely directed toward setting the department's schedule.

In support of her retaliation claims, employee advanced several theories including: (1) disproportionate increase in her assignment to the drive-through window; (2) failure to promote her to an open branch banker job for which she trained and was promised; and (3) wrongful termination for "force balancing" her cash drawer. The court held that there were questions of fact as to how often employee worked the drive-through window in comparison with other employees and whether employer's proffered reason for not promoting her – that it needed a bilingual employee in the job – was pretextual. The court further found that "force balancing" was a legitimate non-discriminatory reason to terminate employee's employment. As such, it granted summary judgment on the retaliation claims as to employee's termination theory but denied it as to her failure to promote and reassignment theories.

***Hodnett v. Chardam Gear Co.*, No. 16-10619, 2017 WL 6621527 (E.D. Mich. Dec. 28, 2017)**

Employee worked as a machinist for employer until his termination on November 7, 2014. On August 21, employee engaged in a verbal altercation with his plant manager. Employee insisted a part was too heavy for him to pick up. Employee told Jennifer Taylor (an employee responsible for maintaining employment records) "this would probably be the last time I would see him." Later that day, employee's car was rear-ended by another vehicle. That evening, employee went to the Henry Ford Health System emergency room. On Friday, August 22, employee notified employer he would not be at work that day or Saturday, August 23 because of the car accident. Employee did not report for work on August 25 ("won't

be in – no ride"), August 26 ("will not be in today"), or September 2 ("vacation day for 9-2-14"). Employee's last day at work was August 29. On October 1, employee applied for lost-wage benefits under an insurance policy he held with non-party Auto-Owners Insurance Company ("Auto-Owners"). On his application, he listed "8-21-14" as the date his disability began. His application was successful. In a letter dated October 16, Auto-Owners told employee that in order to continue receiving benefits past October 17, he would have to submit a disability slip from his treating physician, which should include his current restrictions and the duration of time he would require reimbursement of lost wages. On October 18, he was examined by Dr. Adegbenro at the Michigan Spine & Joint Center. Dr. Adegbenro wrote in his report that employee "states he is not [allowed] to work [with] restrictions." On October 23, Dr. Adegbenro faxed a form to employer, which included this very quote. On November 7, employer sent a letter to employee terminating his employment. Employee responded that he had been on a protected medical leave since August 22, 2014, and he was ready and willing to return to work on November 18 with no restrictions. Employer responded in a letter, stating employee had not sought leave in accordance with company policies, and moreover, employee had provided incorrect information to his doctor about having restrictions. Employee had had no discussions with any supervisor since his last day of work on August 29. Employee filed a complaint alleging violations of the FMLA. Employer filed a motion for summary judgment.

The court said employee's FMLA claim could be analyzed as both an interference and retaliation claim. Employer could obtain summary judgment on either type of claim if it stated a legitimate reason for its challenged conduct that employee could not show to be pretextual. The court said the burden of proof at the *prima facie* stage is minimal, and employee met this burden. With respect to having a "serious health condition," employee met the standard for "chronic conditions" set forth in 29 C.F.R. § 825.115(c): he had periodic visits with health care providers, and his incapacity was periodic rather than concentrated. With respect to giving notice of his intent to take leave, employee had called out of work because of a car accident and asked Dr. Adegbenro to send employer a form, which advised that employee was not to report to work from October 18 to November 18. With respect to causation, the period in this case of approximately two-and-one-half months between the beginning of employee's purported leave period and his termination date was sufficient for employee to meet the causation prong for a *prima facie* case. If an employee has met his burden for a *prima facie* case, the burden shifts to the employer to show it had a legitimate, non-discriminatory reason for terminating the employee. The court stated employer met this burden. It believed employee "engaged in fraud and/or dishonesty" when he represented to his health care provider that employer would not allow him to work with restrictions. Employee could not show pretext by arguing that he held a reasonable, good-faith belief that employer would not have allowed him to work with restrictions. No matter how plausible, this argument did not demonstrate that employer's reason for terminating him was not honestly held. The court granted employer's motion for summary judgment.

***Hodges v. CNCL, LLC*, No. 1:16-cv-33-SA-DAS, 2017 WL 3879090 (N.D. Miss. Sept. 5, 2017)**

Employee, a nurse at a private center, alleged that she was subjected to discrimination and retaliation due to her pregnancy and unlawfully terminated in retaliation for taking FMLA leave following the birth of her child. The District Court for the Northern District of Mississippi granted employer's motion for summary judgment as to all of employee's claims. Applying the framework in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), the court held that even

assuming *arguendo* that employee could state a *prima facie* case of retaliation following her FMLA leave, none of her evidence rebutted employer's explanation that she was terminated for failure to properly secure and dispose of controlled substances, compounded by her inadequate job performance.

***Reagan v. Centre LifeLink Emergency Med. Servs., Inc.*, No. 4:15-CV-1390, 2017 WL 3601982 (M.D. Pa. Aug. 22, 2017)**

Employee was employed as a training director for employer LifeLink Emergency Medical Services. Employee suffered an injury in a bicycle accident and was granted FMLA leave. With a few weeks of employee's FMLA leave remaining, employer sent her a letter indicating she was the target of an internal investigation and needed to respond while still on leave. When employer did not find employee's response sufficient, it terminated her with six days of her FMLA leave remaining. Employee alleged FMLA interference and FMLA retaliation claims.

Employee stipulated to dismissal of her FMLA retaliation claim. A Pennsylvania District Court stated that the FMLA does not provide employees with a right against termination for a reason other than interference with rights under the FMLA. When a terminated employee accuses an employer of FMLA interference, employer can defeat employee's claim if it can demonstrate that employee was terminated for reasons unrelated to employee's exercise of rights. The court determined that employer met that burden. Employer's reason for termination, that employee failed to respond to the company's letter requesting information for their internal investigation, was a legitimate non-discriminatory reason. Ultimately, the court granted employer's motion for summary judgment stating that employee could not offer more than a scintilla of evidence to prove her claims.

***Pena-Barrero v. City of N.Y.*, No. 14-CV-9550 (VEC), 2017 WL 1194477 (S.D.N.Y. Mar. 30, 2017)**

Employee, a former temporary employee, brought suit against his former employer, the City of New York, alleging among other things that he was retaliated against for exercising his rights under the FMLA. Twenty years earlier, employee had been diagnosed with Bipolar Affective Disorder and, as a result, took medication that generated side effects that interfered with his daily living. As a result, employee was excessively absent from or late to work, but he also never took the necessary civil service test for his position. During his employment, employer approved a four-month medical leave of which twelve weeks were retroactively deemed FMLA leave, although employee failed to complete the requisite paperwork. Upon return from leave, employee was unable to log into his computer and various programs and, within a week, employee was terminated without advance notice. Employee alleged, therefore, that his termination was in retaliation for exercising his rights under the FMLA. Employer maintained that its non-discriminatory reason for terminating employee was that it was required by law to replace its temporary employees with individuals who were on the civil service list. Thus, employer filed a motion for summary arguing that employee failed to establish a *prima facie* case and failed to rebut its non-discriminatory reason for the discharge. The district court granted the motion for summary judgment on employee's FMLA retaliation claim.

***Smith v. Senderra RX Partners, LLC*, No. 16-10131, 2017 WL 878005 (E.D. Mich. Mar. 6, 2017)**

Employee was hired as a Customer Service Representative in May 2013 and less than a year later was promoted to team lead. In 2015, employee was placed on a Performance Improvement Plan due to attendance violations. The employer also provided employee with FMLA information after the company learned that employee's daughter suffered from bladder issues. However, employee continued to miss work or give notice of missing work and did not request FMLA leave. Employee resigned her position and then sued her employer for interfering with her FMLA rights and retaliation.

The district court for the Eastern District of Michigan held that employee's interference claims failed because she could not show that she was entitled to leave under the FMLA, that she gave notice of her intention to take leave, or that employer denied her FMLA benefits to which she was entitled. The court held that employee was not entitled to FMLA leave because, according to the certification, it was not medically necessary for her to stay home with her daughter but rather to take her daughter to and from doctor's appointments. Moreover, employee admitted to her employer that she needed to stay home because she was uncomfortable leaving her daughter alone in the evenings, not because her daughter was sick and needed care. Employer had a "legitimate reason unrelated to the exercise of FMLA rights for" accepting employee's resignation, presumably in lieu of termination, and ending her employment. Lastly, under the burden shifting analysis of employee's retaliation claim, employer properly put forth a legitimate, nondiscriminatory reason for the adverse employment action; employee's attendance and performance infractions and employee's failure to show up and give notice for nearly one week.

***Naguib v. Trimark Hotel Corp.*, No. 15-CV-3966 (JNE/SER), 2017 WL 598760 (D. Minn. Feb. 14, 2017)**

Employee, a former executive housekeeper who supervised others, claimed that employer interfered with her right to take FMLA leave, among other claims. Employer filed a motion for summary judgment. The United States District Court for the District of Minnesota granted summary judgment to the company.

While employee was on vacation, the company began an investigation into employee's wage and hour practices relating to her management of other employees. During this same week, employee was hospitalized and subsequently took FMLA leave. Upon employee's return to work from FMLA leave, the company terminated her for various wage and hour violations that were uncovered while she was on vacation and FMLA leave. The court held that the company's legitimate, non-discriminatory reason for her discharge was dispositive. Notably, the company began its investigation before employee requested leave. Moreover, the court noted that close proximity is not enough to create a genuine dispute as to pretext.

***Mistler v. Venture*, No. CV JFM-15-3458, 2017 WL 491635 (D. Md. Feb. 6, 2017)**

A shipping department employee alleged that his supervisor improperly terminated him in retaliation for taking intermittent FLMA leave. Employee asserted a claim of FMLA retaliation, among other claims. The United States District Court for the District of Maryland granted employer's motion for summary judgment.

Employee alleged that he was terminated because he took intermittent FMLA leave. Employer proffered a legitimate reason for his termination – employee failed to give verbal notice and obtain permission from employer to leave work early. Because employee's action violated policy, the court granted summary judgment to employer.

***Guasch v. Carnival Corp.*, No. 15-23454-CIV, 2017 WL 87163 (S.D. Fla. Jan. 10, 2017)**

HIV-positive employee filed suit alleging claims for disability discrimination under the Florida statute and an additional claim for discrimination and retaliation under the FMLA. Employee worked from home as a "Tele-Solutions Specialist" for employer since 2000. Beginning in early 2014, employee received multiple corrective notices relating to his failure to meet internal standards, which culminated in a final warning in August 2014. Employee failed to comply with this warning and was terminated in October 2014.

Employer moved for summary judgment on employee's FMLA claim, wherein the Judge found that neither the interference nor the retaliation claim could succeed because employee's termination for violation a company policy was a permissible, nondiscriminatory reason and that the record did not bear any discriminatory reason for his termination.

Summarized elsewhere:
***Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158 (2d Cir. 2017)+B16**

***Tibbs v. Admin. Office of the Ill. Courts*, 860 F.3d 502 (7th Cir. 2017)**

***Acker v. Gen. Motors LLC*, 853 F.3d 784 (5th Cir. 2017)**

***Cooley v. E. Tenn. Human Res. Agency, Inc.*, No. 17-5355, __ F. App'x __, 2017 WL 6547387 (6th Cir. Dec. 22, 2017)**

***Mistler v. Worthington Armstrong Venture (WAVE)*, 697 F. App'x 201 (4th Cir. 2017)**

***Holton v. First Coast Serv. Options, Inc.*, 703 Fed.Appx. 917 (11th Cir. 2017)**

***Vincent v. Coll. of the Mainland*, 703 F. App'x 233 (5th Cir. 2017)**

***Levaine v. Tower Auto. Operations USA I, LLC*, 680 F. App'x 390 (6th Cir. 2017)**

***Jordan v. Cnty. of Chemung*, 264 F. Supp. 3d 497 (W.D.N.Y. 2017)**

***Coulibaly v. Tillerson*, No. 14-0712 (RC), __ F. Supp. 3d __, 2017 WL 3732096 (D.D.C. Aug. 29, 2017)**

***Sommerville v. Schenker, Inc.*, No. 2:16-CV-10765, 2017 WL 6621529 (E.D. Mich. Dec. 28, 2017)**

***Boyd v. Univ. of Detroit Mercy*, No. 16-14375, 2017 WL 6610621 (E.D. Mich. Dec. 27, 2017)**

***Bailey v. Quest Diagnostics, Inc.*, No. 1:17-CV-625, 2017 WL 6524950 (E.D. Va. Dec. 19, 2017)**

***Boggs v. Cedar Creek, LLC*, No. CIV-16-1481-C, 2017 WL 6503658 (W.D. Okla. Dec. 19, 2017)**

***Percell v. Commw. of Ky. Dep't of Military*, No. 3:16-CV-721-TBR-LLK, 2017 WL 6347973 (W.D. Ky. Dec. 12, 2017)**

***Simons v. Boston Sci.*, No. CV 15-7519, 2017 WL 5951701 (D.N.J. Nov. 30, 2017)**

***Harrison v. Proctor & Gamble Distrib. LLC*, No. 1:15-CV-514, 2017 WL 5523150 (S.D. Ohio Nov. 17, 2017)**

***Rymas v. Princeton HealthCare Sys. Holding, Inc.*, No. 15-8188 (BRM) (LHG), 2017 WL 4858123 (D.N.J. Oct. 27, 2017)**

***West v. Pella Corp.*, No. 5:16-CV-154-TBR, 2017 WL 4765653 (W.D. Ky. Oct. 20, 2017)**

***Dearden v. GlaxoSmithKline LLC*, No. 15 Civ. 7628, 2017 WL 4084049 (S.D.N.Y. Sept. 14, 2017)**

***Teenier v. Charter Commc'ns, LLC*, No. 16-cv-13226, 2017 WL 3704382 (E.D. Mich. Aug. 28, 2017)**

***Roys v. Upper Iowa Univ.*, No. 16-CV-2046-KEM, 2017 WL 3574441 (N.D. Iowa Aug. 17, 2017)**

***Nelson v. Ceramtec N. Am. Corp.*, No. 6:16-0367-HMH-JDA, 2017 WL 3473996 (D.S.C. Aug. 14, 2017)**

***Stanley v. Delaware N. Cos.*, No. A-16-CV-834 LY, 2017 WL 3485078 (W.D. Tex. Aug. 14, 2017)**

***Fernandez v. Woodhull Med. & Mental Health Ctr.*, No. 14-CV-4191 (MKB), 2017 WL 3432037 (E.D.N.Y. Aug. 8, 2017)**

***Jackson v. BNSF Ry. Co.*, No. 4:16-CV-695-A, 2017 WL 3263131 (N.D. Tex. July 28, 2017)**

***Hughes v. Inova Health Care Servs.*, No. 1:16-CV-674, 2017 WL 2785420 (E.D. Va. June 26, 2017)**

***Greenman v. Metro Prop. & Cas. Ins. Co.*, No. 15-004-ML, 2017 WL 2438776 (D.R.I. June 6, 2017)**

***Marrin v. Capital Health Sys., Inc.*, No. 14-2558 (FLW) (LHG), 2017 WL 2369910 (D.N.J. May 31, 2017)**

***Cronk v. Dolgencorp, LLC*, No. 16-11616, 2017 WL 2225108 (E.D. Mich. May 22, 2017)**

***Dyer v. Wal-Mart Stores, Inc.*, No. 16-cv-12496, 2017 WL 2213570 (E.D. Mich. May 19, 2017)**

***Tillotson v. Manitowac Co., Inc.*, No. 15-CV-14479, 2017 WL 1632886 (E.D. Mich. May 2, 2017)**

***Alejandro v. N.Y. City Dep't of Educ.*, No. 15-CV-3346 (AJN), 2017 WL 1215756 (S.D.N.Y. Mar. 31, 2017)**

***Popko v. Penn State Milton S Hershey Med. Ctr.*, No. 1:13-CV-1845, 2017 WL 1078158 (M.D. Pa. Mar. 22, 2017)**

***Robertson v. Home Depot Inc.*, No. CV 14-806-JWD-EWD, 2017 WL 1088091 (M.D. La. Mar. 22, 2017)**

***Stewart v. Wells Fargo Bank Nat'l Ass'n*, No. 5:15-CV-00988-MHH, 2017 WL 977412 (N.D. Ala. Mar. 14, 2017)**

3. Pretext

***Hicks v. City of Tuscaloosa*, 870 F.3d 1253 (11th Cir. 2017)**

Employee, former female employee for the city police department, brought this action against the city, alleging, *inter alia*, FMLA retaliation. Employer appealed to the 11th Circuit Court of Appeals following a jury trial. The jury found that employee's job reassignment was retaliatory in violation of the FMLA.

The 11th Circuit Court of Appeals held that evidence was sufficient to support the jury's findings that reassignment of employee from narcotics task force to patrol division after employee returned from leave, was in retaliation in violation of the FMLA. Multiple witnesses overheard conversations using defamatory language plus temporal proximity of only eight days from when employee returned from leave to when she was reassigned supported the inference that there was intention discrimination under the FMLA.

***Tibbs v. Admin. Office of the Ill. Courts*, 860 F.3d 502 (7th Cir. 2017)**

A former administrative assistant in the Illinois court system who was suspended the day she returned from FMLA leave and later terminated after she chose not to attend a disciplinary meeting alleged that her termination was in retaliation for her taking leave. Addressing employee's claim reliance on the timing of her suspension, the court noted that "suspicious timing alone is rarely enough by itself." Next, the court noted that employer provided evidence that employee was terminated for facially legitimate reasons, including ignoring instructions and taking actions without the authority to do so. Although employee argued that the reasons were "phony," the court noted that merely disagreeing with employer's reason did not demonstrate pretext, particularly where there was insufficient evidence that any proffered reason was false.

***DePaula v. Easter Seals El Mirador*, 859 F.3d 957 (10th Cir. 2017)**

Employee brought suit under the FMLA against employer care facility after his 22-year tenure ended upon his termination. Employee asserted both retaliation and interference claims. The district court granted employer's motion for summary judgment on both claims and employee appealed. As to his retaliation claim, employee argued that he presented sufficient evidence to show the employer's proffered non-discriminatory reasons for the termination were

pretext. The court rejected employee's arguments. Employee first argued that employer's stated reasons – financial difficulties and employee's inadequate performance – were pretext due to the circumstantial evidence of the temporal proximity between his taking FMLA leave and his termination. However, Tenth Circuit case law is well settled that temporal proximity May be sufficient to establish a *prima facie* case, but temporal proximity, without more, is insufficient to show pretext. Second, the court reasoned that employee waived his other three pretext arguments because he only asserted them with regard to his interference claim in his opposition to employer's motion. The court went on to explain, in dicta, how each of those three arguments failed, even if they could be read to support his retaliation claim. Therefore, the court affirmed the district court's ruling because employee failed to show employer's proffered legitimate non-discriminatory reasons for terminating him were pretext.

In its analysis of employee's interference claim, the court assumed employee could establish the first two elements of the *prima facie* case and focused on the third element: the causal connection between the termination and the assertion of FMLA rights. The court reasoned that employer showed it would have terminated employee regardless of his taking of FMLA leave. Thus, even though employer terminated employee while he was on his job-protected FMLA leave, the decision was not "related to" employee's exercise of those rights. In other words, there was no causal connection between the two. As a result, the court affirmed the district court's ruling granting employer's motion.

***Caldwell v. KHOU-TV*, 850 F.3d 237 (5th Cir. 2017)**

Employee worked as a video editor for a television station. In March or April 2014, he informed employer of his need to take two surgeries. Prior to the second surgery, he and another video editor were laid off as part of a reduction in force. Employee sued alleging FMLA interference and ADA theories. The district court granted employer's summary judgment on both theories, holding that employee failed to carry his burden at the pretext stage.

The Fifth Circuit Court of Appeals reversed on both claims, reasoning that because employee raised an issue for trial on pretext with his ADA claim, that would equally apply to his FMLA claim. In particular, the court held that employer's shifting and inconsistent reasons for his discharge could not support the granting of summary judgment on either theory. Employer, for example, first explained that employee was laid off because he refused to perform work required of him, but then stated that employee failed to take the initiative in doing that work. Later, employer stated that employee's layoff had nothing to do with his work ethic. In view of these contradictory reasons for his layoff, summary judgment was not appropriate for employee's ADA and FMLA claims.

In doing so, however, the court rejected other arguments employee made. First, the fact that employer moved for summary judgment based on a retaliation theory with respect to the interference claim employee brought was irrelevant. That was because the arguments defendants raised – that employee never asked for FMLA leave and that he could not prove pretext – were applicable to both retaliation and interference claims. Second, it also ruled that the district court did not act *sua sponte* in granting summary judgment on his interference claim by using a retaliation analysis since employee was given proper notice of this by the filing of employer's motion for summary judgment.

***Cooley v. E. Tenn. Human Res. Agency, Inc.*, No. 17-5355, ___ F. App'x ___, 2017 WL 6547387 (6th Cir. Dec. 22, 2017)**

Employee appealed an order granting her employer's motion for summary judgment on her retaliation claim under the FMLA. The district court concluded employee had not met her burden of establishing that employer's stated, nondiscriminatory reason for firing her was pretextual. Employee worked for employer as a van driver, transporting elderly and disabled patients. Because her job required assisting some of these passengers, including those in wheelchairs, in getting into and out of the van, the job required the ability to lift up to 50 pounds without assistance. Employee requested and received FMLA leave from employer to undergo back surgery. Her leave was set to expire on August 12, 2015. Because employee sought to return to work from a job-impairing injury, employer required her to first undergo a medical examination and provide a fitness-for-duty certification. To conduct employee's examination, employer hired Dr. John McElligott, who was on the U.S. Department of Transportation's ("DOT") National Registry of Certified Medical Examiners. During the examination, employee admitted she was taking a narcotic-pain medication. Based on this admission, Dr. McElligott deemed her unfit to return to work, due to safety-sensitive issues. Employer then terminated employee because she could not pass the fitness-for-duty test. At her termination meeting, employee became highly emotional.

The district court ruled that employee met her burden to establish a *prima facie* case of FMLA retaliation. The temporal proximity of her firing in relation to her exercise of her FMLA rights might suffice to establish a causal connection. However, under the *McDonnell Douglas* burden-shifting framework, employer met its burden of providing a legitimate, non-discriminatory reason for firing her. The court of appeals agreed with the district court's decision, stating, "[w]e have held that a defendant can meet its burden of articulating a legitimate, nondiscriminatory reason in FMLA retaliation cases when it 'fires an employee who is indisputably unable to return to work at the conclusion of the 12-week period of statutory leave.' *Edgar v. JAC Prod., Inc.*, 443 F.3d 501, 506–07 (6th Cir. 2006)." Employee contended that employer's expressed reason for firing her was pretextual. The court of appeals of rejected all of employee's arguments. Employee alleged employer terminated her without consulting her immediate supervisor. The court of appeals stated that, while this was proven to be true, it did not demonstrate that employer did not terminate employee for its proffered reason. Employee alleged that employer did not allow her to take 90 days of unpaid leave. The court of appeals stated that, while employer did indeed have a leave-without-pay policy, it required that an employee apply for it, which employee did not do. Employee alleged that Dr. McElligott contradicted her own physician, who had released her to return to work. The court of appeals stated employer was within its rights to rely on Dr. McElligott's medical opinion. Unlike Dr. McElligott, employee's physician was not on DOT's National Registry of Certified Medical Examiners. Finally, employee alleged that in an interrogatory response, employer identified an additional reason for firing her that was not included in her separation notice: insubordination. But, as the district court had explained, the separation notice was prepared prior to the termination meeting where employee's insubordination occurred. The court of appeals affirmed the decision to grant summary judgment.

***Wells v. Retinovitreous Assoc., Ltd.*, 702 F. App'x 33 (3d Cir. 2017)**

Employee brought suit against employer for retaliation (in violation of the ADA, FMLA, and Pennsylvania Human Relations Act) related to an action she previously filed related to

disability discrimination. The Court of Appeals affirmed the district court's granting of a summary judgment in favor of the employer. The court found that even if the employee had made out a *prima facie* case for retaliation, she failed to show that the employer's proffered reasons for adverse employment action were pretextual.

Employee received two disciplinary warnings prior to filing her initial lawsuit against her employer. In the five months that followed her lawsuit, employee was disciplined five times (including her eventual termination). Employee argued that her performance reviews and prior history with the company showed that she only received discipline once she filed an action against the employer. The court disagreed, noting that her two performance reviews before filing the lawsuit showed a need to improve in "several key areas," and that she received two disciplinary actions prior to her lawsuit. The court further noted that the employee did not show that her discipline was pretextual or at all related to her previous lawsuit, furthermore, employee's last violation (the violation that resulted in her termination) was found during a normal audit of "all employee billing work."

***Feise v. N. Broward Hosp. Dist.*, 683 F. App'x 746 (11th Cir. 2017)**

A nurse claimed employer unlawfully terminated her in retaliation for taking FMLA leave. The Eleventh Circuit affirmed the district court's summary judgment for employer. While the court found that employee made a prima facie retaliation case, it held that she did not put forward sufficient evidence to show that employer's reason for her termination was mere pretext. Employee argued the district court overstated the differences between her and her proffered comparators. The Eleventh Circuit agreed with the district court's finding that employee was not "nearly identical" to the comparators she identified. Additionally, the court also upheld the district court's decision that employee did not produce enough circumstantial evidence sufficient for a reasonable jury to find employer's proffered reason for terminating her was unworthy of credence or that retaliation more likely than not motivated employer to terminate her. The court noted that temporal proximity alone is generally insufficient to establish pretext, but that the court did not need to consider every fact argued by employee. The court held it is not enough for a termination to be unexpected or unfair for relief under the FMLA, but there must be evidence of retaliation.

***Sterrett v. Giant Eagle, Inc.*, 681 F. App'x 145 (3d Cir. 2017)**

Employee was a union maintenance worker in the warehouse for defendant OK Grocery Company, Inc., a division of defendant Giant Eagle, Inc. Employee suffered from migraines for which he used intermittent FMLA leave. Employee alleged that after he began taking leave, his supervisor and co-workers subjected him to a pattern of hostility. After employee was absent on one shift to grieve the loss of his "aunt," who was determined not to be a relative, employer terminated employee. Employee and employer entered into a last chance agreement ("the LCA") wherein employee could be terminated for any act of dishonesty without prior warning. Additionally, the LCA included a release of all claims against employer. Three months later, employee began work at 11:00 p.m., suffered from a migraine, laid down for most of the time he was at work, and finally left work early on leave. Employee's failure to clock out when he left triggered the company's attention. His supervisor reviewed security camera footage and found that the employee had not been working during most his shift. During a subsequent investigatory interview, employee admitted that his production was less than what employer expected and that he had not informed the company about his inability to work during his shift. Thereafter, the

company terminated him for violating the LCA because employee stayed on the clock when he was not working. Employee alleged, among other things, FMLA retaliation and interference.

The district court for the Western District of Pennsylvania granted employer summary judgment on the FMLA claims. The Third Circuit affirmed the dismissal of the FMLA claims, under a mixed-motive analysis, rather than the district court's lone pretext analysis. The court held that employee failed to create an inference that employer's stated reason for termination was pretextual. Under the mixed motive analysis, the court held that employee failed to raise an issue of material fact as to the decision maker's motive and knowledge. Evidence of animosity by co-workers and his supervisor had no bearing on the company's decision to fire him because the decision was based not only on employee's supervisor's report but on employee's own admission. Under the "cat's paw" theory, employee failed to show that his supervisor's behavior was a proximate cause of his termination or that his supervisor's animus "infected [the company's] decision making."

***DeCicco v. Mid-Atl. Healthcare, LLC*, No. 14-2933, __ F. Supp. 3d __, 2017 WL 3189034 (E.D. Pa. July 27, 2017)**

Employee brought suit to enforce FMLA rights against Mid-Atlantic Healthcare, a residential care facility, after being terminated from his position. Employee brought both a retaliation and an interference claim. The court denied employer's motion for summary judgment as to both claims. On employee's retaliation claim, the dispute focused on whether employee had demonstrated a causal connection between the termination and his request for FMLA leave. Following Third Circuit case law, the court determined that employee established this causal connection due to the "unusually suggestive" temporal proximity between employee's request for leave and his termination two days later. The court next determined that employer met its burden of producing a legitimate non-discriminatory reason for terminating employee because of employee's deficient work performance, failure to meet the requirements of the performance improvement plan, and unprofessional conduct in investigating his supervisor without authorization. The court's ruling turned on the issue of pretext. The court considered: (1) an email sent by employee's supervisor to employer's regional director of operations, just hours after employee submitted his request for leave, stating her intent to terminate employee; (2) employee's supervisor's decision to put employee on a third performance improvement plan that was set to expire two weeks later; and (3) the unusually suggestive temporal proximity between employee's request for leave and his termination, especially because employee was placed on the performance improvement plan just one day before and it had not yet expired. Thus, the court found a reasonable jury could find employer's justifications for terminating employee were pretext.

With respect to employee's interference claim, employer argued that dismissal on summary judgment was appropriate because it was duplicative of employee's retaliation claim. The court noted that some courts within the Third Circuit had ruled that redundant interference claims could be appropriately dismissed. However, the court distinguished those cases on the grounds that the employees in those actions did not allege that any FMLA benefits were actually withheld. Here, employee alleged that he was entitled to FMLA leave for which he was denied because of his termination. The court concluded that without further guidance from the Third Circuit, it could not rule as a matter of law that employee's interference claim was so duplicative of his retaliation claim that summary judgment was warranted.

***Zakaria v. MNP Corp.*, 263 F. Supp. 3d 654 (E.D. Mich. 2017)**

Employee brought an anti-discrimination claim under the FMLA for unlawful interference and retaliation. Under the *McDonnell Douglas* approach, the district court determined that employee established a prima face case. Employer moved for summary judgment, proffering non-discriminatory reasons for employee's termination were part of the company's implementation to downsize overstaffing. In addition, employers claimed attendance was the sole factor in determining which employees would be let go. Furthermore, employers claimed to rely on a spreadsheet that listed employees and their attendance records, which listed employee with the third worst attendance. The district court rejected employers' argument, finding material issues with employers' proffered reasons for employee's termination. The district court determined the spreadsheet employers claimed to identify employee with the third worst attendance, failed to consider employee's medical leave during employers' reduction in force. Furthermore, the district court held employers could not have relied on the spreadsheet to identify employee's attendance because the document was created after terminating employee. Thus, the district court denied employer's motion for summary judgment.

***Bailey v. Quest Diagnostics, Inc.*, No. 1:17-CV-625, 2017 WL 6524950 (E.D. Va. Dec. 19, 2017)**

Employee was a medical technologist for Quest Diagnostics ("Quest"). When she was hired, she signed the Quest Integrity Commitment Pledge, which emphasized the importance of integrity, honesty, and cooperation among employees. On August 16, 2016, employee informed her supervisor that she had hit her right hand on a supply table at work and was in pain. The supervisor did not direct employee to contact CIGNA, employer's third-party leave administrator, about FMLA leave. Instead, the supervisor filed a worker's compensation claim on behalf of employer with Travelers' Insurance. Employee saw an orthopedic specialist who determined that employee was "unable to work," and employee took medical leave on August 25, 26, 27, 30, and 31. On September 12, employee had a follow-up appointment with Dr. Zachary Weidner, who gave her a note, a photocopy of which employee submitted to her supervisor. In the photocopy, several words were scratched out and replaced with a handwritten annotation saying patient should have "no use" of the right hand. There were neither initials nor a date next to the handwritten annotation. The managers of occupational safety and health at employer's Chantilly, Virginia location found the note to be suspicious, and commenced an investigation. Employee initially explained that she had received the annotated note from Dr. Weidner, but then she refused to speak about this further. On September 30, employer terminated employee for falsification of a note in violation of her Integrity Commitment Pledge. Employee filed a complaint against employer for FMLA interference and retaliation. Employer filed a motion for summary judgment.

Employer contended that employee had failed to establish the first element of a *prima facie* case of FMLA retaliation (engaging in a protected activity), because she did not formally request FMLA leave. The court disagreed, stating that an employee need not expressly mention the FMLA when requesting or taking leave. Employee informed her supervisor that she had suffered an injury and needed to take medical leave for that injury. The court said this notice was sufficient to establish that employee was engaging in a protected activity. Employee's termination satisfied the adverse employment action requirement, and the temporal proximity of employee's termination to her leave satisfied the causation requirement. She was terminated just a month after taking leave. Under the *McDonnell Douglas* burden-shifting framework, if an

employee has made out a *prima facie* case of retaliation, employer must provide evidence of a legitimate, non-discriminatory reason for the adverse employment action. Employer stated that it believed employee had falsified a doctor's note. However, employee was able to establish pretext by showing that the managers of occupational safety and health had stated, several times, they felt employee was faking her injury, and because, even after Dr. Weidner explained to employer that he had annotated the note and forgot to initial it, employer did not reconsider its decision to terminate employee. The court said that a genuine issue of material fact existed as to why employer terminated employee, and denied employer's motion for summary judgment on employee's FMLA retaliation claim.

Regarding employee's FMLA interference claim, employee demonstrated that employer had misclassified her FMLA leave for her hand injury as personal leave. According to the Ninth Circuit and some district courts, misclassification of leave can qualify as interference. But employee failed to show that such interference had harmed her. The court granted employer's motion for summary judgment on employee's FMLA interference claim.

***Valle v. Martz Coach Co.*, No. 3:16CV1524, 2017 WL 5499169 (M.D. Pa. Nov. 16, 2017)**

Employee worked as a ticket agent for employer. In mid-January 2016, she went on an FMLA leave of absence for a medical procedure. While on the leave, employer conducted an investigation into claims that employee had threated other employees. In late-January 2016, based on the conclusions from the investigation, employee was terminated.

Employee brought FMLA interference and retaliation claims. On a motion for summary judgment brought by employer, the federal court for the Middle District of Pennsylvania ruled that when both theories are alleged based on a claim that an employer took an adverse employment action because of FMLA leave, the proper analysis follows the retaliation framework.

With that perspective, the court denied the motion for summary judgment. The court noted that employee was able to raise a genuine issue as to whether the reason articulated for the termination was a pretext for unlawful retaliation. In so doing, it noted that employee was terminated only eight days after she started her leave, highlighted contradictions in the testimony offered by employer concerning its investigation and pointed out that employee who had complained of the alleged threats was unable to provide either a specific or approximate date of the purported behavior.

***Millen v. Oxford Bank*, No. 2:16-cv-12230, 2017 WL 4811571 (E.D. Mich. Oct. 25, 2017)**

Employee worked for employer as manager in different branches of its banks. Employee took FMLA leave beginning in July 2015. While on FMLA leave, employer downsized its operations, which included eliminating employee's position. It gave her notice that she was being terminated during her leave. Employee sued employer for interference with her rights under the FMLA and retaliating against her for taking leave under the FMLA.

The court granted employer's motion for summary judgment on employee's first theory, holding that employee could not establish a *prima facie* case on her interference claim. It explained that she could not show that she would have been entitled to her position but-for taking her FMLA leave.

This was because the undisputed facts reflect that she would have been terminated without regard to taking such leave. It had identified that her position was the least profitable and that when terminating her for that reason, it also had no legal duty to transfer her to another one.

Employee's retaliation claim was equally deficient since she could not demonstrate a causal link between her taking FMLA leave and her termination. While temporal proximity between protected activity and adverse employment action may, standing alone, give rise to a *prima facie* case of retaliation, it cannot do the same for rebutting a legitimate, non-discriminatory reason for an employee's discharge at the pretext stage. Employer, as noted above, adduced evidence that employee was terminated after determining that her position was not profitable. Because employee was relying solely on temporal proximity to support her claim for retaliation, she could not demonstrate pretext and summary judgment was therefore appropriate.

***Robey v Weaver Popcorn Co., Inc.*, No. 1:16-CV-281-TLS, 2017 WL 4539914 (N.D. Ind. Oct. 11, 2017)**

Employer maintained an attendance policy providing for a written warning #1 if an employee has, within a rolling six month period, (1) three unexcused tardies, late arrivals, and/or leave earlies or (2) two unexcused absences. If an employee has another attendance violation within 90 days of written #1, a written warning #2 will result. A further violation within 90 days of written #2 will warrant termination of employment. On May 23, employee came into work late after suffering a work-related injury the day before. On that day, he received three different forms of discipline: employer issued him written warning #1 and #2, and suspended him. The first was given to him that day due to three prior unexcused absences, but was backdated and carried an effective date of May 9. Because he was tardy to work on May 23, he was issued written warning #2. Also on that same day, employer suspended him until May 27 for violating its policy requiring him to immediately report the work-related injury he sustained the day before, which he did not. Employee was seen by employer's worker's compensation doctor and was cleared to return to work. Employee disagreed with that assessment and refused to report to work. Employer gave him paperwork to request FMLA intermittent leave, and continuous leave from May 28 to June 4. He was given until June 17 in which to submit medical certification for both leaves, but failed to do so. Employer therefore denied both leaves and his absences during that time became unapproved. Because he already had been issued written warning #2, his further unexcused absences resulted in his termination.

The court granted employer's unopposed motion for summary judgment on employee's complaint, which stated an express claim for retaliation, but which the court also construed as containing an interference theory. Employee supported his claim for interference on grounds that he believed that employer's safety manager instructed the doctor who would have approved employee's medical certification not to sign it. Because this was only supported by speculation, the court granted dismissed employee's interference claim.

The court also granted summary judgment on employee's theory of retaliation. In particular, it rejected his attempt to establish pretext based on being issued two attendance warnings on May 23, immediately after he sustained a work-related injury. While failure to follow normal procedures can constitute pretext, employer demonstrated that it has issued multiple attendance warnings to an employee on the same day, one of which that bore an

effective date that predated the actual date it issued the multiple warnings. Because employee could not adduce any evidence to show that this was pretextual, the court dismissed this as grounds to support his retaliation claim. Neither was employee able to support his retaliation claim by taking issue with employer's administration of its attendance policy after he received written warning #2. After receiving that warning, employer properly followed its policy by firing him after he failed to obtain medical certification excusing his absences after written warning #2. This also formed the basis for rejecting any claim of temporal proximity between employee's request for FMLA leave and his termination. Employer's adherence to its attendance policy after employee failed to provide medical certification for his absences defeated any causal link between such request and his firing.

***Teetor v. Rock-Tenn Servs., Inc.*, No. 4:15CV1002 HEA, 2017 WL 4357379 (E.D. Mo. Oct. 2, 2017)**

Employee worked for employer for ten years prior to her termination, and suffered from several chronic illnesses. During her employment, she took several leaves of absences pursuant to the FMLA. In early 2015, employee experienced several complications as a result of her chronic illnesses. In February, she told employer that she would need FMLA leave to take an extended leave of absence due to her health problems. Employee's FMLA request was approved on March 26, 2015. However, she received a letter informing her that her employment was terminated effective March 14, 2015. Employee brought an interference and retaliation claim under the FMLA, along with several other claims under state and federal employment law statutes. The court denied employer's motion for summary judgment, finding a factual issue existed as to employee's FMLA claims. The court rejected employer's argument that it made the decision to fire employee prior to the exercise of her FMLA rights, as it was not supported by the record before the court.

***Harrell v. Handi Med. Supply, Inc.*, No. 16-737 (JRT/FLN), 2017 WL 4326478 (D. Minn. Sept. 28, 2017)**

Employee, who worked as a sales person for employer, was approved for intermittent FMLA leave to care for her husband's mental health condition. She remained on intermittent leave for two years prior to her termination. Employer never denied her FMLA leave during this time, and she never experienced any resistance from employer in taking leave. In August 2015, employer made some management changes, and during a meeting regarding these changes, employee's supervisor remarked that "even though he knew something was going on in [employee's] life, she needed to invest more time" working for employer. Employee, upset by the exchange, returned to her work area and made a scene before leaving early for the day on approved FMLA leave. Employee also took FMLA leave the following day. Approximately a week later, employee's supervisor decided to issue her a written warning for engaging in inappropriate behavior after the management meeting. While her supervisor was presenting the written warning, employee accused him of using her husband's disability against her. The supervisor became visibly angry and vehemently denied employee's accusation. At the end of the meeting, employee made additional insubordinate remarks, including mocking employer's mission statement. Based on this conduct, employer terminated employee's employment. She subsequently filed suit, alleging various state law claims as well as FMLA retaliation and interference. The court granted employer's motion for summary judgment, finding that while employee had stated a *prima facie* case for both claims, she failed to establish that employer's legitimate, nondiscriminatory reason for her termination – her insubordinate behavior – was

pretext for FMLA retaliation or interference. The court noted that employee had admitted engaging in the conduct in question, and that weighed against a finding of pretext.

***Nelson v. Ceramtec N. Am. Corp.*, No. 6:16-0367-HMH-JDA, 2017 WL 3473996 (D.S.C. Aug. 14, 2017)**

Employee brought suit against employer for interference with FMLA rights and retaliation. Employee and employer brought cross motions for summary judgment. The district court denied both motions. Employee was a grinding set up operator for employer. In January 2016, employee had an emergency illness and needed surgery. Employer sent employee documentation regarding employee's eligibility for FMLA leave. Shortly thereafter, employer changed employee's job to kiln operator and changed his work schedule in accordance with the new position. On the day employee returned to work and learned of the changes, he complained of the change in position and schedule. Employee was told that he was transferred from the grinding area because the company needed somebody reliable there. Employee worked at the kiln for a short time until he began experiencing pain and other symptoms. Employee left early for the day. Employer then terminated employee on the ground that he initially refused to work in the kiln room and then left work without permission.

On the cross motions for summary judgment, the district court found that there were genuine issues of material fact as to whether employer interfered with employee's FMLA leave by not restoring employee to his original position when he returned from FMLA leave. The court explained there was a genuine issue of whether employee was returned to his same position because, while pay, benefits, worksite, and reporting supervisor were the same, employee had different job duties, a lower employment grade, and a different work schedule. The district court also found that there was a genuine issue of material fact as to whether employee was entitled to be restored to the same position. In particular, the court found that there were issues regarding whether the decision to transfer employee was based on his FMLA leave or his numerous prior attendance issues.

The court next addressed employee's retaliation claim, based upon his termination, under the *McDonnell Douglas* framework. The court explained that employee had made a *prima facie* showing that he had engaged in protected activity, that he suffered an adverse employment action, and that there was a causal connection. The court noted that the differences between employer's stated reasons for termination and the reasons given in his termination letter was itself probative of pretext. The court also noted that employer's reference to employee "threatening" to take more FMLA leave was probative of pretext. Thus, there was a genuine issue of material fact regarding whether the proffered reasons were true or pretextual. Accordingly, the court denied both motions for summary judgment.

***Foster v. AT&T Mobility Servs. LLC*, No. 5:15-CV-256-BO, 2017 WL 2799847 (E.D.N.C. June 27, 2017)**

Employee, a then-pregnant employee with medical accommodations, sued her employer for FMLA retaliation and negligent termination. Ruling on employer's motion for summary judgment, a District Court in the Eastern District of North Carolina held there was a genuine issue of material fact with regard to employee's FMLA retaliation claim and denied employer's summary judgment motion as to that claim. The court found that employer conceded all of the elements of employee's *prima facie* case, but noted that there was a genuine issue with regard to

whether employer's proferred nondiscriminatory reason for termination, which related to two violations of employer's standards of conduct, was a pretext. The court was persuaded by evidence which demonstrated that employee's actions relating to her desertion of a workstation, failure to clock out, and excess break were caused by her high-risk pregnancy. With regard to the second incident, the court noted evidence that employee used the word "stupid" instead of a profanity as employer suggested, and that on the same day as employee's alleged profane outburst, she was sent home after she requested that her supervisor call an ambulance because of painful cramps she experienced, to which the supervisor reacted by laughing. In sum, the court held there was conflicting evidence regarding employer's intent behind terminating the pregnant employee.

Mollet v. St Joseph's Hosp. Breese, No. 16-cv-0293-MJR-DGW, 2017 WL 2778656 (S.D. Ill. June 27, 2017)

Employee, a certified respiratory therapist in a hospital's cardiopulmonary department, sued her employer, a hospital, alleging retaliation in violation of the FMLA. Employer's employee handbook included a policy requiring disciplinary action against employees with routine and chronic unscheduled absences. FMLA leave-related absences were exempt from the policy. After employee had numerous unscheduled absences over a two-year period and received multiple corrective actions and more than one performance improvement plan, she was subject to termination under the policy. However, her employer made an exception and converted the termination to a suspension, providing her a final written warning and performance improvement plan. Approximately six months later, employee developed pneumonia, was hospitalized, and sought and obtained approval for approximately five weeks of FMLA leave. Employee remained absent from work for an additional 15 days beyond the initially approved five weeks without submitting any additional medical certification, which employer's third-party administrator had requested. Nonetheless, employer allowed employee to return to work. Approximately three months later, employee failed to report for scheduled shifts for four days without providing adequate notice under the policy. Employer terminated employee's employment 11 days after she returned to work based on her excessive absences.

The court granted employer's motion for summary judgment on employee's FMLA retaliation claim on two bases. In attempting to establish a causal link between her FMLA leave and her termination, employee asserted that employer's use of the past tense in stating the FMLA absences "were not counted against her" demonstrated that, at the point of termination, employer did count those absences against her. The court found this language ambiguous and insufficient to allow a jury to find she was fired because she took FMLA leave.

The court also reasoned that, even if employee could establish a causal link, no reasonable juror could conclude employer's proffered reason for termination was pretext. The uncontroverted evidence demonstrated that employee had struggled with attendance throughout the year and was terminated for excessive absences, despite employer's making exceptions to the policy to avoid terminating her employment. Her longer history of attendance issues were well-documented, and the timing of her termination immediately followed an additional unexcused, non-FMLA absence of several days. The court further noted there was no evidence in the record to suggest employer's stated reason for the termination was dishonest. Therefore, no reasonable trier of fact could conclude employee was fired for taking FMLA leave.

***Fox v. Nexteer Auto. Corp.*, No. 16-CV-10462, 2017 WL 2351741 (E.D. Mich. May 31, 2017)**

Employee brought suit against Nexteer Automotive Corporation where she was a former employee as a parts sorter and later in the "heat treatment" department. She alleged claims for interference and retaliation in violation of the FMLA. Employee took leave under the FMLA for her pregnancy. Eventually, employee exhausted her FMLA leave for the calendar year, but could not return to work without a clearance from her physician pursuant to company policy. She was not able to schedule a doctor's appointment and receive clearance until fifteen days after her scheduled return date. As a result, she had several days that were not covered by her FMLA leave. These uncovered days eventually led to her termination because she was only allowed a certain number of absences.

Employer filed a motion for summary judgment as to all claims. As to the interference claim, the court held that employee was barred by the statute of limitations. Employee did not bring her claim within the two years allotted and she was unable to show that employer's actions were willful (which would allow for a three year statute of limitations). The court also held that the FMLA retaliation claim failed on the merits. Under the *McDonnell Douglas* burden-shifting framework, employee was unable to show pretext – that unlawful retaliation was employer's reason for terminating her. The court analyzed each of employer's actions through its human resources department and came to the conclusion that nothing that was done supported an inference of pretext. The court also shot down an argument of temporal proximity between her exercise of FMLA rights and her termination because temporal proximity is not sufficient to show pretext. Therefore, the court granted summary judgment as to employer's motion.

***Tillotson v. Manitowac Co., Inc.*, No. 15-CV-14479, 2017 WL 1632886 (E.D. Mich. May 2, 2017)**

Employee, a product sales manager, brought FMLA retaliation and interference claims against his former employer. On February 3, 2017, the court granted employer's motion for summary judgment. Employee then moved to alter or amend the judgment on his FMLA retaliation claim, arguing that the court improperly made factual determinations in resolving the motion for summary judgment. The court denied employee's motion.

Employee's position required frequent travel. He suffered from "dumping syndrome," which sometimes required him to use the bathroom up to eight times per day. Employee kept his condition a secret from employer for considerable time. Employee later informed a Human Resources employee about his condition and was instructed to document the medical condition and reach out to a third-party contractor utilized to handle applications for leaves of absence. The third-party informed employee that his request for leave would be approved pending medical certification that he was suffering from a serious medical condition. Employee's doctor submitted a certification recommending only work restrictions, and thus leave was denied. Employee and his employer jointly agreed that no immediate changes were needed to his work duties. In April 2015, employer considered employee for termination while there was a reduction in the work force, but he was not discharged. In November 2015, employee was discharged. The termination was based on a rubric employer uses to rank employees' performances and potential. Employee was ranked as the lowest product sales manager. The court inferred that the rubric was created prior to employee informing his employer of his request for a reduced schedule.

Employee argued that employer's failure to explain how he was ranked low on the rubric calls into question whether his determination was based on data or conjecture and that the court should have drawn inferences regarding the subjectivity of the rubric in his favor. The court held that it reasonably accepted employee's explanation of how the rubric was relied upon because employee presented no evidence to contradict employer's assertions. The court acknowledges that even if it improperly inferred that the rubric was created after he requested a reduced schedule, employee still failed to show any genuine issue of fact regarding pretext and reiterates that it was employee's burden to rebut employer's assertion that he was discharged based on a nondiscriminatory rubric.

***Nunez v. Lifetime Prods., Inc.*, No. 1:14-CV-00025-RJS-PMW, 2017 WL 1493679 (D. Utah Apr. 26, 2017)**

Note: Employer's name is misspelled in the case name, but it is spelled correctly as "Lifetime Products, Inc." in the opinion and in the pending appeal docket.

Pro se employee brought suit alleging interference and retaliation in violation of the FMLA. Employer granted intermittent FMLA leave to the employee several months before his termination. His performance record contained multiple citations for being absent without permission, for inappropriate emails, for being argumentative, and for being abusive toward coworkers.

The district court granted summary judgment for the employer on both FMLA claims. The employee failed to present sufficient evidence of pretext in the interference claim and of causation in the retaliation claim. The employer demonstrated a nondiscriminatory reason for terminating the employee, unrelated to his exercise of his FMLA leave.

***Patterson v. AJ Servs. Joint Venture I, LLP*, No. CV 115-138, 2017 WL 830394 (S.D. Ga. Mar. 2, 2017)**

Employee filed suit in the district court through which she alleged that employer interfered with her rights under the FMLA and discharged her in retaliation for requesting FMLA leave, among other claims. The case was before the court on employer's motion for summary judgment. Employee had received numerous reprimands for poor performance and, although employee denies such, had been informed that employer was looking to replace her. Employer discharged employee seven days after she requested FMLA leave after it discovered further issues with her performance. In defending against the interference claim, employer noted that employee admitted that she would not have been able to return to work after the expiration of the twelve weeks of FMLA leave. The court noted that an admission that an employee cannot return within the twelve week FMLA time frame defeats a claim of interference, but does not defeat a claim of retaliation. The defense only limits the damages available.

Employee argued that employer had a retaliatory motive because: (1) her supervisor blamed her for mistakes he committed; (2) employee's supervisor discharged six other women in close temporal proximity to their requests for medical leave; (3) employee's supervisor treated men more favorably; and (4) employee's supervisor had a history of making negative comments about women and treating women poorly. The court presumed that employee established a *prima facie* case of discrimination and analyzed whether employee rebutted employer's reasons for discharge. The court then rejected each of employee's arguments noting that: (1) the court

does not analyze whether a supervisor's determination as to an employee's performance is correct and will not second guess such determinations; an employee must show evidence of retaliatory intent, which was not provided in this case; (2) the evidence regarding the discharge of six other women in temporal proximity to their request for medical leave did not include any specific facts indicating a discriminatory intent or a connection to a discriminatory intent with regard to employee; mere conjecture is not evidence; (3) employee failed to provide any evidence that the males were similarly situated with respect to position or type of misconduct; and (4) the court noted that if the bad acts were true, they were reprehensible, but not evidence of discriminatory intent against employee.

***Becknauld v. Cmmw. of Pa.*, No. 678 C.D. 2016, 2017 WL 33732 (Pa. Cmmw. Jan. 4, 2017)**

Employee sued her employer of more than four years for retaliation under the FMLA. Less than a year before her termination, employee told a supervisor about her medical conditions. In response, the supervisor encouraged employee to discuss her FMLA options with human resources. Soon after, employee submitted an FMLA certification listing two medical conditions. Human resources, however, asked employee to re-submit the certification with only one medical condition. But before employee could do so, employer terminated her for "failure to submit leave for time away from work," along with other performance-related failures that existed prior to her request for FMLA leave.

Using the *McDonnell Douglas*, burden-shifting framework, the trial court held that employee failed to show a causal link between an adverse action and protected activity. That is, the evidence did not show that employer terminated employee for requesting FMLA leave. Nor was there evidence that employer's reasons for terminating her were pretext. In an email exchange with human resources personnel, employee never complained that she was fired in retaliation. On the contrary, she admitted that the reasons for her termination were accurate, though she believed they were not worthy of discharge. In a document employee completed when she "was forming a discrimination case," she again admitted to some of the termination reasons. Moreover, when asked about the reasons for her termination at a deposition, employee routinely answered that she "did not recall," "did not remember" or "I don't know." Absent from her deposition was any testimony that employee believed that the termination reasons were pretext. She never testified that employer fired her for requesting FMLA leave. Because of the lack of evidence of both a causal link and pretext, the court dismissed employee's FMLA claim before trial.

Summarized elsewhere:
***Holton v. First Coast Serv. Options, Inc.*, 703 Fed.Appx. 917 (11th Cir. 2017)**

***Vincent v. Coll. of the Mainland*, 703 F. App'x 233 (5th Cir. 2017)**

***Neal v. T-Mobile USA, Inc.*, 700 F. App'x 888 (11th Cir. 2017)**

***Wen Liu v. Univ. of Miami Sch. of Med.*, 693 F. App'x 793 (11th Cir. 2017)**

***Ward v. Ingersoll-Rand Co.*, 688 F. App'x 104 (3d Cir. 2017)**

***Johnson v. Fifth Third Bank*, 685 F. App'x 379 (6th Cir. 2017)**

***Bartels v. S. Motors of Savannah, Inc.*, 681 F. App'x 834 (11th Cir. 2017)**

***Gomez v. Haystax Tech., Inc.*, No. 1:16-CV-1433, ___ F. Supp. 3d ___, 2017 WL 5478179 (E.D. Va. Nov. 14, 2017)**

***Cooper v. D.C.*, No. 14-1526 (EGS), ___ F. Supp. 3d ___, 2017 WL 4355917 (D.D.C. Sept. 29, 2017)**

***Jordan v. Cnty. of Chemung*, 264 F. Supp. 3d 497 (W.D.N.Y. 2017)**

***Hill v. Branch Banking & Tr. Co.*, 264 F. Supp. 3d 1247 (N.D. Ala. 2017)**

***Reyer v. St. Francis Country House*, 243 F. Supp. 3d 573 (E.D. Pa. 2017)**

***DeVoss v. Sw. Airlines Co.*, No. 3:16-CV-2277-D, 2017 WL 5256806 (N.D. Tex. Nov. 13, 2017)**

***Diamond v. Am. Fam. Mut. Ins. Co.*, No. 4:16-00977-CV-RK, 2017 WL 5195881 (W.D. Mo. Nov. 9, 2017)**

***Keogh v. Concentra Corp.*, No. 16-CV-11460, 2017 WL 4618411 (E.D. Mich. Oct. 16, 2017)**

***Hodges v. CNCL, LLC*, No. 1:16-cv-33-SA-DAS, 2017 WL 3879090 (N.D. Miss. Sept. 5, 2017)**

***Stringfield v. Cosentino's Food Stores*, No. 15-0693-CV-W-FJG, 2017 WL 3880774 (W.D. Mo. Sept. 5, 2017)**

***Kordistos v. Mt. Lebanon Sch. Dist.*, No. 16-615, 2017 WL 3593882 (W.D. Pa. Aug. 21, 2017)**

***Roys v. Upper Iowa Univ.*, No. 16-CV-2046-KEM, 2017 WL 3574441 (N.D. Iowa Aug. 17, 2017)**

***Grant v. Hosp. Auth. of Miller Cnty.*, No. 1:15-CV-201 (LJA), 2017 WL 3527703 (M.D. Ga. Aug. 16, 2017)**

***Fernandez v. Woodhull Med. & Mental Health Ctr.*, No. 14-CV-4191 (MKB), 2017 WL 3432037 (E.D.N.Y. Aug. 8, 2017)**

***Harris v. City of Lewisburg*, No. 1:15-cv-00114, 2017 WL 3237780 (M.D. Tenn. July 31, 2017)**

***Singleton v. Pilgrim's Pride Corp.*, No. 3:15-4999-JFA, 2017 WL 2952970 (D.S.C. July 11, 2017)**

***Brown v. Excelda Mfg. Co., Inc.*, No. 15-CV-13349, 2017 WL 2351738 (E.D. Mich. May 31, 2017)**

***Ibewuike v. Johns Hopkins Hosp.*, No. WMN-15-1630, 2017 WL 2131842 (D. Md. May 17, 2017)**

***Balding v. Sunbelt Steel Tex., Inc.*, No. 2:14-CV-00090, 2017 WL 1435719 (D. Utah Apr. 21, 2017)**

***Edmonds v. Gestamp Chattanooga LLC*, No. 1:15-CV-65, 2017 WL 1380553 (E.D. Tenn. Apr. 17, 2017)**

***Johnson v. Camden City Sch. Dist.*, No. 1:15-CV-01124-NLH-JS, 2017 WL 1227925 (D.N.J. Apr. 3, 2017)**

***Howard v. Balon Corp.*, No. CIV-15-737-D, 2017 WL 1215758 (W.D. Okla. Mar. 31, 2017)**

***Flynn v. Fidelity Nat'l Mgmt. Servs., LLC*, No. 6:16-CV-87-ORL-40TBS, 2017 WL 1155399 (M.D. Fla. Mar. 28, 2017)**

***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

***Naguib v. Trimark Hotel Corp.*, No. 15-CV-3966 (JNE/SER), 2017 WL 598760 (D. Minn. Feb. 14, 2017)**

***Yeger v. Inst. of Culinary Educ., Inc.*, No. 14CV8202-LTS, 2017 WL 377936 (S.D.N.Y. Jan. 25, 2017)**

***Clarke v. Nw. Respiratory Servs., LLC*, No. A16-0620, 2017 WL 393890 (Minn. App. Jan. 30, 2017)**

a. Timing

***Kelly v. Univ. of Pa. Health Sys.*, No. 16-3303, __ F. App'x __, 2017 WL 3980524 (3d Cir. Sept. 11, 2017)**

Employee sued her former employer for claiming that it retaliated against her in violation of the FMLA when it terminated her employment. The district court granted employer's motion for summary judgment, and employee appealed. The Third Circuit affirmed the district court's grant of summary judgment for the same reasons stated by the district court. First, the court noted that employee's FMLA claim was governed by the *McDonnell Douglas* burden-shifting analysis. As to employee's FMLA claim, the district court had concluded that she had asserted a *prima facie* case of FMLA retaliation but, upon employer's offer of a legitimate nondiscriminatory reason for her termination – employee's disciplinary history and the fact that she was on final warning when she made another serious performance mistake – failed to prove pretext. The court concluded that the fact that employee was terminated eight months after returning from FMLA leave and, that employee, before termination, was demoted rather than fired due to performance issues, cut against pretext.

***Jordan v. Cnty. of Chemung*, 264 F. Supp. 3d 497 (W.D.N.Y. 2017)**

Employee, a part-time corrections officer, filed suit against her former employer County alleging FMLA violations as well as multiple other employment claims under federal and state law. The District Court for the Western District of New York granted employer's motion for summary judgment on employee's FMLA interference claim but denied summary judgment (in part) on her claim that her employer retaliated against her for exercising her FMLA rights. The court held that employee had failed to make a *prima facie* showing of FMLA interference, since her employer had approved intermittent FMLA leave as needed to take care of her sick children.

The court evaluated employee's FMLA interference claim on the basis of whether there was evidence that she was denied benefits to which she was entitled under the FMLA. It noted that her interference claim should not be analyzed under the shifting burdens of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), which applied to her FMLA retaliation claim.

To establish a *prima facie* case of FMLA retaliation, employee must show that (1) she exercised rights protected under the FMLA; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent. A *prima facie* showing of retaliatory intent requires only a *de minimus* causal connection between a protected activity and adverse action by employer. The court held that employee met her *prima facie* burden to show retaliatory intent after her FMLA leave when employer: (1) removed her prescheduled Sunday shift, when she only requested FMLA leave for her Tuesday shifts; (2) opposed employee's application for unemployment benefits; (3) refused to restore employee's regularly scheduled shifts after she secured child care and sought to return; and (4) terminated employee's employment. In addition, the court determined that employer put forth legitimate non-discriminatory reasons for its actions: (1) employee's two regular shifts were linked together and treated jointly; (2) it opposed unemployment because it believed she was still employed; (3) she could not be returned to her prior shifts after they were given to another officer; and (4) she was terminated due to a long history of unexcused absences and excessive sick time. Employee raised triable issues of fact as to whether the first three of employer's proffered reasons were pretextual, but the court found that the evidence of her termination more than a year after her leave was not pretextual as a matter of law. The court granted summary judgment on employee's retaliatory termination claim, but denied employer's motion for summary judgment on her remaining retaliation theories.

**Note: Appeal of this decision to the Second Circuit Court of Appeals was filed October 4, 2017.*

<u>*Palmer v. Kaiser Found. Hosps. Tech. Risk Office*, No. 16-CV-2376- WJM-KMT, 2017 WL 6547344 (D. Colo. Dec. 22, 2017)</u>

Employee worked for employer as a senior case manager, beginning March 31, 2015. In September, employee's supervisor rated employee's performance as "needs improvement" on her performance review. Employee and her supervisor began to have weekly one-on-one meetings. In December, the supervisor placed employee on a "Performance Improvement Plan" ("PIP"). As of March 2016, employee did not show improvement, and supervisor planned to terminate her at their March 24 weekly meeting. But employee did not come to work on March 23-25, sending emails to the supervisor requesting sick days. The supervisor granted employee's request and sent her the final tracking chart for her PIP, noting that she had not successfully accomplished the plan objectives. Employer indicated she would reschedule their March 24 meeting for "as soon as we can" or no later than April 8. Around April 6, employee requested FMLA leave, and a medical provider submitted paperwork to employer in support of employee's request. Employee returned to work on April 11, and her supervisor terminated her. Employer approved employee's request for FMLA leave and applied it retroactively to her last week of employment. Employee filed a complaint against employer for violations of the FMLA. A magistrate judge recommended that employer's motion for summary judgment be granted.

The magistrate judge said that because employer had granted employee's FMLA request, a claim for FMLA interference would depend on a finding that employee's termination had interfered with her FMLA rights. But because it was undisputed that employer had decided to terminate employee prior to her requesting FMLA leave, any claim of interference, based on termination, should fail. This chronology also would make it impossible for employee to prevail on a claim of FMLA retaliation. A review of the evidence would defeat any allegation made by employee that employer's reasons for terminating her were pretextual. Employee filed an objection to the magistrate judge's recommendation, including additional narrative regarding the chronology of her FMLA leave request. The court stated that the undisputed record showed that the decision to terminate employee was made *before* employee requested FMLA leave, and her request was granted, albeit retroactively. Her additional details did not alter the magistrate judge's analysis. Employer's motion for summary judgment was granted.

***Lovelace v. Wash. Univ. Sch. of Med.*, No. 4:15 CV 1694 RWS, 2017 WL 5278118 (E.D. Mo. Nov. 13, 2017)**

Employee alleged that employer retaliated against her for taking FMLA leave. Employer's motion for summary judgment was granted by the court based on employee's inability to show that there was a causal connection between her FMLA leave and her termination. Nine months passed between the time that employee took FMLA leave and her termination. The court concluded that employee's alleged causal link was too temporally tenuous to establish a connection between the protected conduct and the adverse employment action. Employee failed to establish a genuine issue of material fact connecting her FMLA leave to her termination, which the court surmised to have been caused by employee's intervening performance and behavior.

***Clark v. Sw. Airlines Co.*, No. 1:16-CV-910-RP, 2017 WL 4853794 (W.D. Tex. Oct. 26, 2017)**

Employee, a customer service agent for employer, Southwest Airlines, brought suit against employer claiming that he was terminated as retaliation for taking FMLA leave. The Western District Court of Texas granted the employer's motion for summary judgment. Employee claimed retaliation under the FMLA, and argued that he was discharged for taking FMLA leave, whereas employer claimed that he was discharged for making threatening comments at work about bringing a shotgun to work, and therefore violating employer's Zero Tolerance Workplace Violence Policy.

The court rejected employee's argument. While the court held that employee's one instance of taking FMLA leave in close proximity to his discharge was enough to minimally establish the causation element of his *prima facie* case, the court then held that employee's violation of the workplace violence policy was a legitimate, non-discriminatory reason for terminating his employment. The court also held that employee could not prove that this reason was a pretext, given: (1) the great length of time between the allegedly discriminatory acts and the adverse employment action; (2) the fact that employee's complaints that he made throughout his employment did not relate to his FMLA leave; and (3) that employee could not establish his cat's paw theory.

***Cannon v. Equilon Enters., LLC*, No. 2:14-cv-4805-PMD-KFM, 2017 WL 3484275 (D.S.C. Aug. 15, 2017)**

Employee sued his former employer alleging, among other things, that he was fired in retaliation for taking FMLA leave. Employer moved for summary judgment, and the magistrate judge denied the motion with respect to employee's FMLA claim. Employer objected to that portion of the magistrate judge's ruling, and the district court overruled employer's objections.

In its objections, employer first argued that the magistrate judge misapplied the "but-for causation standard," but the district judge held that the magistrate judge properly applied the *McDonnell Douglas* burden-shifting paradigm. Employer next argued that the magistrate judge improperly relied on "three types of evidence in the record: (1) evidence of temporal proximity; (2) evidence of [defendant] misstating facts to the EEOC; and (3) evidence of [defendant] inconsistently applying the policy [employee] purportedly violated." The district judge rejected that objection because employer began investigating employee for a policy violation "shortly after" he requested leave, and the timing of the investigation supported an inference that the investigation was only conducted because of employee's request. The court then explained that evidence of misstating facts to the EEOC regarding when the investigation of employee began – i.e., before or after employee requested leave – could lead a reasonable juror to believe that employer intentionally misstated that fact rather than innocently made a mistake. Lastly, the district judge held that evidence in the record supported employee's assertion that employer misapplied its employee reimbursement expense policy and that evidence demonstrated that others who were similarly situated were treated differently.

Summarized elsewhere:
***Shelton v. Boeing Co.*, 702 F. App'x 567 (9th Cir. 2017)**

***Parkhurst v. Am. Healthways Servs.*, 700 F. App'x 445 (6th Cir. 2017)**

***Pecora v. ADP, LLC*, 232 F. Supp. 3d 1213 (M.D. Fla. 2017)**

***Gill v. Genpact, LLC*, No. 1:17-CV-454(LMB/JFA), 2017 WL 5319938 (E.D. Va. Nov. 13, 2017)**

***Millen v. Oxford Bank*, No. 2:16-cv-12230, 2017 WL 4811571 (E.D. Mich. Oct. 25, 2017)**

***Keogh v. Concentra Corp.*, No. 16-CV-11460, 2017 WL 4618411 (E.D. Mich. Oct. 16, 2017)**

***Robey v Weaver Popcorn Co., Inc.*, No. 1:16-CV-281-TLS, 2017 WL 4539914 (N.D. Ind. Oct. 11, 2017)**

***Nelson v. Ceramtec N. Am. Corp.*, No. 6:16-0367-HMH-JDA, 2017 WL 3473996 (D.S.C. Aug. 14, 2017)**

***Sawa v. RDG-GCS Joint Ventures III*, No. 15-6585, 2017 WL 3033996 (E.D. Pa. July 14, 2017)**

***Singleton v. Pilgrim's Pride Corp.*, No. 3:15-4999-JFA, 2017 WL 2952970 (D.S.C. July 11, 2017)**

***Marrin v. Capital Health Sys., Inc.*, No. 14-2558 (FLW) (LHG), 2017 WL 2369910 (D.N.J. May 31, 2017)**

***Godwin v. Corizon Health*, No. 16-00041-B, 2017 WL 1362033 (S.D. Ala. Apr. 10, 2017)**

***Alejandro v. N.Y. City Dep't of Educ.*, No. 15-CV-3346 (AJN), 2017 WL 1215756 (S.D.N.Y. Mar. 31, 2017)**

***Dulany v. Brennan*, No. 16-CV-149-JHP-FHM, 2017 WL 991070 (N.D. Okla. Mar. 14, 2017)**

***Ashby v. Amscan, Inc.*, No. 3:15-CV-00643-GNS, 2017 WL 939324 (W.D. Ky. Mar. 9, 2017)**

***Reganato v. Appliance Replacement Inc.*, No. CV 15-6164 (RMB/JS), 2017 WL 747463 (D.N.J. Feb. 27, 2017)**

***Brown v. Vanguard Grp., Inc.*, No. CV 16-946, 2017 WL 412802 (E.D. Pa. Jan. 30, 2017)**

***Scales v. FedEx Ground Package Sys. Inc.*, No. 15 C 50038, 2017 WL 345576 (N.D. Ill. Jan. 24, 2017)**

***Becknauld v. Cmmw. of Pa.*, No. 678 C.D. 2016, 2017 WL 33732 (Pa. Cmmw. Jan. 4, 2017)**

b. Statements and Stray Remarks

***Parkhurst v. Am. Healthways Servs.*, 700 F. App'x 445 (6th Cir. 2017)**

Employee was a Telephonic Nurse who provided clinical advice to enrollees in wellness plans created by contract between employee's employer and health insurers and employers. Employee sued her employer alleging it terminated her employment in February 2014 in retaliation for having taken a continuous 10-day FMLA leave to have surgery in October 2013. Employer continuously evaluated employee productivity using a metrics-based system that tracked employees' attempted and successful calls per hour. During the period from October 2013 until her termination, employee's productivity failed to meet employer's minimum standards. Employee was placed on two separate performance improvement plans and a third, "Final PIP" in February 2014. When employee failed to improve sufficiently in accordance with the Final PIP, her employment was terminated.

Employee admitted she expected to be fired because she had not met the company's performance metrics. However, she maintained employer's proffered reason was not the actual motivating reason for her termination, but pretext for unlawful retaliation. Employee pointed to a series of health-, age-, and disability-related comments her supervisor made to her regarding her ability to meet the job's demands, including comments that employee had had a lot of health issues; that the reason employee could not keep up with the demands of the job was probably because employee was not feeling well; and responding, "Oh, again?" or "Okay," when employee submitted her FMLA paperwork. She also asserted that the termination followed her FMLA leave in close temporal proximity and that this was evidence of retaliatory animus.

In affirming summary judgment for employer, the court of appeal held the comments were isolated and ambiguous and not evidence of FMLA-related animus. The court further noted that the context in which the comments were made – discussions about employee's

deficiencies in productivity – was important to this conclusion. With regard to temporal proximity, the court noted that suspicious timing can be a strong indicator of pretext, but only when accompanied by other, independent evidence of retaliation. The court held that the four-month lapse between employee's FMLA leave and her termination was not suspicious when considered with her documented underperformance and, even if it were considered suspicious, the lack of other circumstantial evidence could not support an inference of discriminatory or retaliatory motive based on temporal proximity alone.

Summarized elsewhere:
***Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299 (10th Cir. 2017)**

***Bartels v. S. Motors of Savannah, Inc.*, 681 F. App'x 834 (11th Cir. 2017)**

***Sterrett v. Giant Eagle, Inc.*, 681 F. App'x 145 (3d Cir. 2017)**

***Lenoir v. SGS N. Am., Inc.*, No. 1:16-CV-58-SA-DAS, 2017 WL 4158625 (N.D. Miss. Sept. 18, 2017)**

***Nelson v. Ceramtec N. Am. Corp.*, No. 6:16-0367-HMH-JDA, 2017 WL 3473996 (D.S.C. Aug. 14, 2017)**

***Fernandez v. Woodhull Med. & Mental Health Ctr.*, No. 14-CV-4191 (MKB), 2017 WL 3432037 (E.D.N.Y. Aug. 8, 2017)**

***Floyd v. Cnty. of Maricopa*, No. 16-15450, 2017 WL 2480738 (9th Cir. June 8, 2017)**

***Bonini v. Fla. Dep't of Corrs.*, No. 8:17-cv-164-T-23TGW, 2017 WL 2427263 (M.D. Fla. June 5, 2017)**

4. Comparative Treatment

***Perry v. Covenant Med. Ctr. Inc.*, No. 15-CV-11040, 2017 WL 588456 (E.D. Mich. Feb. 14, 2017)**

Employee brought suit in the district court through which she alleged that she was discharged in retaliation for taking FMLA leave, among other claims. Employee prevailed at trial. After the trial judge denied a motion and employer's request for a judgment as a matter of law, employer brought a renewed motion or, in the alternative, for a new trial. The court denied the motions and upheld the verdict. Employee worked as an office coordinator in a physicians' office. Employee received favorable performance evaluations, but upon requesting intermittent FMLA leave, began receiving reprimands and disciplinary actions for various performance deficiencies. In an attempt to rebut the reprimands, employee asked her subordinates to provide statements in support of employee's rebuttal. The subordinates felt uncomfortable doing so and reported the matter to the supervisor. The supervisor concluded that employee's request violated employer's rules against dishonesty and unethical behavior and discharged employee. The only issue before the court was whether employee provided sufficient evidence of pretext such that the matter should be presented to a jury. The court found that employee: (1) failed to show that employer did not have an "honest belief" in its reasons for discharge; (2) did present a temporal proximity between the discharge and protected activity as some evidence of discharge; (3) failed to show "shifting inconsistencies" in the reasons for discharge because poor communication,

falsification of documents and poor performance are consistent with poor leadership; (4) failed to show that employer's insistence that she take continuous leave instead of intermittent leave violated the FMLA's proscription against requiring more leave than necessary because employee admitted that she could not perform the essential functions of her position; (5) did establish that employer blocked her from retrieving items she need to successfully perform her job upon return from leave; and (6) did establish that she began receiving formal discipline after returning from FMLA leave, even though employer admitted that employee had performance issues before she took FMLA leave.

Summarized elsewhere:
***Mourning v. Ternes Packaging Ind., Inc.*, 868 F.3d 568 (7th Cir. 2017)**

***Eppinger v. Caterpillar Inc.*, 682 F. App'x 479 (7th Cir. 2017)**

***Gomez v. Haystax Tech., Inc.*, No. 1:16-CV-1433, __ F. Supp. 3d __, 2017 WL 5478179 (E.D. Va. Nov. 14, 2017)**

***Hill v. Branch Banking & Tr. Co.*, 264 F. Supp. 3d 1247 (N.D. Ala. 2017)**

***Singleton v. Pilgrim's Pride Corp.*, No. 3:15-4999-JFA, 2017 WL 2952970 (D.S.C. July 11, 2017)**

***Brown v. Excelda Mfg. Co., Inc.*, No. 15-CV-13349, 2017 WL 2351738 (E.D. Mich. May 31, 2017)**

C. Mixed Motive

***Egan v. Del. River Port Auth.*, 851 F.3d 263 (3d Cir. 2017)**

An engineering department employee claimed employer retaliated against him for exercising his right to take leave under the FMLA. The Third Circuit found that the district court erred in requiring employee to provide direct evidence of retaliation and vacated the FMLA verdict in favor of employer and remanded on the FMLA claim. The Third Circuit held that the Department of Labor's regulation prohibiting retaliation for exercising FMLA rights is consistent with Congress's goal of enabling workers to address serious health issues without repercussion. The Court also held that the Department of Labor's use of a mixed-motive framework was a permissible construction of the FMLA and that a mixed-motive jury instruction should be available for FMLA retaliation claims. Because the FMLA is silent as to whether direct evidence is required to prove a claim, the Court found employee should be allowed to prove his claim using either direct or circumstantial evidence. The district court denied employee's request for a mixed-motive instruction, which the Third Circuit determined to be error. Based on this reasoning, the Court vacated the FMLA judgment and said that the district court should have determined whether there was evidence from which a reasonable jury could conclude that employer had legitimate and illegitimate reasons for its employment decision and that employee's use of FMLA leave was a negative factor in the employment decision.

***Colonna v. UPMC Hamot & UPMC*, No. 1:16-cv-0053 (BJR), 2017 WL 4235937 (W.D. Pa. Sept. 25, 2017)**

Employee, a medical records clerk and office assistant, brought claims against employers pursuant to the FMLA and the ADA. In response to employer's motion for summary judgment, the district court found that employee could not establish a claim for unlawful interference under the FMLA as employee was permitted to take, and did take, intermittent FMLA leave for an eye condition. The district court then considered whether employee could establish a claim for unlawful retaliation, focusing on whether causation was established. Although employee had asserted a pretext theory, which requires a demonstration that the protected status was the "determinative factor," the court also considered the claims under the more lenient mixed-motive framework, which requires that employee only demonstrate that his or her protected status was a "motivating" factor. Under either theory, the court found that employee's claims would fail as employee failed to produce any evidence suggesting that their use of FMLA leave was a factor in the termination.

Summarized elsewhere:
***Bartels v. S. Motors of Savannah, Inc.*, 681 F. App'x 834 (11th Cir. 2017)**

***Long v. Endocrine Soc'y*, 263 F. Supp. 3d 275 (D.D.C. 2017)**

***Clark v. Sw. Airlines Co.*, No. 1:16-CV-910-RP, 2017 WL 4853794 (W.D. Tex. Oct. 26, 2017)**

***Walker v. Verizon Pa., LLC*, No. 15-4031, 2017 WL 3675384 (E.D. Pa. Aug. 25, 2017)**

***Saari v. Mitre Corp.*, No. 15-3295 (MAS) (DEA), 2017 WL 1197756 (D.N.J. Mar. 30, 2017)**

D. Pattern of Practice

***Witbeck v. Equip. Tr., LLC*, No. 1:17-CV-0498, 2017 WL 6606906 (M.D. Pa. Dec. 27, 2017)**

Employee worked for employer for about four years as a truck supervisor. After suffering a heart attack in 2015, employee experienced ongoing cardiovascular problems. In January 2016, he underwent surgery to have a defibrillator implanted his chest. He was out of work for about two weeks in late January and early February 2016. Throughout his employment, his supervisors generally considered him to be a very good employee, but their demeanor toward him changed in 2015 when he began to have health problems. Before and after his surgery, his supervisors became "very condescending toward [him] and expressed annoyance" with his requests for time off. On February 23, 2016, following his return from medical leave, he was terminated for "unsatisfactory performance." He was purported to have provided false information to his manager regarding an accident that occurred earlier that day. However, before this date, employer had already begun searching for his replacement. Employee filed a complaint with claims of FMLA interference and retaliation. Employer moved to dismiss.

Regarding his interference claim, employee argued that his termination amounted to a deprivation of benefits and therefore constituted interference. But the court said the Third Circuit had made it plain that for an interference claim to be viable, an employee must show that FMLA benefits were actually withheld. The court granted employer's motion to dismiss the interference claim, but gave employee an opportunity to amend. To establish a claim for retaliation, an employee must show that he invoked his FMLA rights, suffered an adverse

employment action, and the adverse action was causally related to the invocation of his rights. To show causation, an employee must demonstrate either an unusually suggestive temporal proximity between the protected activity and adverse action, or a pattern of antagonism, coupled with timing, to establish a causal link. Although the passage of one month between employee's FMLA leave and termination did not, as employer argued, constitute an unusually suggestive temporal proximity, employee was able to show a pattern of antagonism. Employer's motion to dismiss the retaliation claim was denied.

CHAPTER 11.

ENFORCEMENT, REMEDIES, AND OTHER LITIGATION ISSUES

I. Overview

II. Enforcement Alternatives

Henderson v. Enters**., No. 4:15-cv-01522-SGC, 2017 WL 951722 (N.D. Ala. Mar. 10, 2017)**

Employee was a former employee for Mid-South Electronics, Inc. She filed a suit against Mid-South for FMLA interference and was awarded monetary damages. Defendant Koller Enterprises purchased the assets of Mid-South and knew of employee's suit. After employee's counsel learned that Mid-South had "little or no ability" to provide relief to employee commenced this action seeking declaratory judgment to recover from defendant Koller Enterprises, Inc. as a successor to liability incurred by Mid-South. Employer moved to dismiss for lack of subject matter jurisdiction, failure to state a claim, and failure to join necessary party; the Northern District of Alabama, Middle Division denied the motion.

In *Henderson,* employer filed a motion to dismiss this suit for the court's lack of subject matter jurisdiction. Employer argued that employee lacked standing because her injuries were not "fairly traceable" to employer. The court explained that the FMLA provides for successor liability and employee provided a basis for recovery by adequately showing that employer met the requirements for successor liability under the FMLA. Additionally, employer argued that employee's claim was not ripe for adjudication. However, the court explained that the trial court in *Henderson v. Mid-South Electronics, Inc.* No. 4:13-CV-01166-KOB (N.D. Ala. *Filed* June 21, 2013) entered a judgment in favor of employee. For this reason, the court found employer's ripeness argument to be moot.

Next, employer asserted that the matter be dismissed for employee's failure to state a claim for which relief May be granted. Employer argued that employee's claims were barred by the applicable statute of limitation. The court reasoned that because employee's direct claim against employer under the FMLA alleged willful violation of the law, the limitations period was extended to three, rather than its normal two years. Thus, the three-year limitation applied. Employer also maintained that the matter be dismissed for employee's failure to plead sufficient facts under any FMLA theory. Because Mid-South was found liable for violating the FMLA, employer's argument was moot. The court also determined that employee sufficiently alleged employer's liability as a successor to Mid-South.

Lastly, employer argued that the case be dismissed for employee's failure to join Mid-South, a necessary party under Federal Civil Procedure Rule 19. The court explained that insofar as employee sought only to hold employer liable as a successor in interest, the relief requested

only affected employer. The court ruled that the nature of the contractual relationship between Mid-South and employer had not yet been established and dismissal on the basis of Mid-South and employer's relationship was premature.

A. Civil Actions

Summarized elsewhere:
***Henderson v. Enters.*, No. 4:15-cv-01522-SGC, 2017 WL 951722 (N.D. Ala. Mar. 10, 2017)**

1. Who Can Bring a Civil Action

a. Secretary

b. Employees

***Doucette v. Johnson*, No. CV 16-11809, 2017 WL 840406 (E.D. Mich. Mar. 3, 2017)**

Employee worked as a transportation security officer for defendant federal agency. He was fired and the agency issued a decision concluding that it had not violated Title VII and the Americans With Disabilities Act and therefore did not discriminate against employee. Employee then filed a complaint alleging that his termination violated the FMLA.

The court granted employer's motion to dismiss for lack of subject matter jurisdiction as to its facial and factual challenges to employee's complaint. As to the facial challenge, the court explained that private and public sector employees are governed by, respectively Title I and Title II of the FMLA. While both titles confer the same substantive rights on both categories of employees, only a private sector employee May bring a civil suit to redress violations of the FMLA. A public sector employee, on the other hand, must file an administrative grievance. Because employee has the burden of stating facts supporting jurisdiction, he failed in showing that he was a private employee that could file a civil suit. The court also ruled that employee's claims disputing his actual employment status, contending that employer waived sovereign immunity, and requesting discovery were not appropriate to take up when assessing a facial challenge, but ones that applied to employer's factual attack on his complaint.

The court granted employer's motion on factual grounds as well. It ruled that employee's request for discovery lacked merit because he failed to identify any discovery he would need to respond to issue of coverage under Title I or Title II. Also lacking merit was employee's view that he was an employee in the excepted service and thus was entitled to bring a civil suit as opposed to the civil service which is one governed by Title II. This was because excepted service employees were still civil service employees falling under Title II who could not bring a civil lawsuit. Employee's argument that employer waived sovereign immunity failed for several reasons. First, the fact that employer allowed him to take FMLA leave did not constitute a waiver of sovereign immunity because FMLA provides the same leave rights to employees under Title I and Title II but does not authorize the latter to seek civil relief. Second, although employer's final agency decision allowed him to file suit, those related to claims under Title VII of the Civil Rights Act and the Americans With Disabilities Act, both of which permit civil suits by civil service employees. Third, the fact that the final agency decision referred to FMLA in it did not amount to a waiver since a waiver of sovereign immunity must be expressly stated in a statute.

Summarized elsewhere:
***__Cruthirds v. Lacey__*, __No. 5:14-CV-00260-BR, 2017 WL 2242868 (E.D.N.C. May 22, 2017)__**

c. Class Actions

***__Wilkinson v. Greater Dayton Reg'l Trans. Auth.__*, __No. 3:11-cv-247, 2017 WL 3578702 (S.D. Ohio Aug. 17, 2017)__**

Employees represented a putative class and several subclasses of employees of employer, alleging that employer violated numerous provisions of the FMLA. Before the court was employees' third amended motion for class certification and appointment of class counsel. Employees described numerous perceived FMLA violations by employer and sought both money damages and various equitable relief, including injunctive and declaratory relief. The court ultimately denied employees' motion for class certification and appointment of class counsel.

Employer argued that class certification was inappropriate because none of the named employees were currently employed by employer and therefore did not have standing to pursue prospective injunctive relief. As a general rule, former employees lack standing to pursue injunctive relief on behalf of a Rule 23(b)(2) class because there is no real threat they will be subject to the allegedly unlawful employment policies. Employees, on the other hand, argued the proper characterization of the issue is whether their claims were moot or not.

The court rejected employees' mootness argument because employees' claims were neither inherently transitory (they did not by their nature become moot in such a short amount of time as to preclude meaningful judicial review) nor were they similar to a pre-trial detainee who claims their constitutional rights were violated. Furthermore, this was not a case where employer voluntarily stopped doing the challenged conduct in order to moot the claims.

Employees then argued that their ongoing claims for monetary relief allowed them to represent the class and subclasses. The court noted that employees provided no case law for this proposition, and this line of thinking ran contrary to the requirement that their claims were typical of the class. The court thus rejected this argument, finding employees did not have a personal stake in the outcome as any injunction ordered would not affect the named employees as former employees.

Finally, the named employees argued the class should be certified to prevent employer from systematically targeting the named employees in order to moot their claims. The court also rejected this argument, noting that in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, __ U.S. __,137 S. Ct. 1645, 198 L. Ed. 2d 64 (2017), the Supreme Court held that every employee must satisfy the "case or controversy" requirement for standing if they seek relief distinct from the original employee, even if the original employee met the standing requirement. Because the named employees were no longer employed by employer, they would not benefit from an injunction against employer, and their individual claims for money damages were distinct from the injunctive relief sought on behalf of the class.

The court ultimately found that regardless of whether the applicable standard was standing or mootness, the named employees could not seek injunctive or declaratory relief, and they could not serve as representatives of the class or any of the subclasses. Moreover, four of the five proposed subclasses failed for reasons of impossibility because the classes could not be defined until the case was resolved on the merits. The court refused certification on the one

subclass that did not violate this standard because it did not meet the requirements for commonality.

2. Possible Defendants

Summarized elsewhere:
***Boadi v. Ctr. for Human Dev., Inc.*, 239 F. Supp. 3d 333 (D. Mass. 2017)**

***Pegues v. Miss. State Veterans Home*, No. 3:15-CV-00121-MPM-JMV, 2017 WL 3298684 (N.D. Miss. Aug. 2, 2017)**

3. Jurisdiction

***Franklin v. City of Dallas*, No. 3:17-CV-0994-D, 2017 WL 2666246 (N.D. Tex. June 21, 2017)**

Employee brought suit in state court alleging her employer retaliated against her in violation of the FMLA. After employer removed the case to federal court based on federal question jurisdiction, employee moved to remand the case to state court on the basis that the following language in the text of the FMLA: "An action to recover the damages or equitable relief prescribed in paragraph (1) May be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees[.]" (Emphasis added). Employee argued this language effectively precludes the removal of claims under the FMLA which are brought in state court. Citing to precedent in the Fifth Circuit as well as the United Stated Supreme Court where similar arguments have been expressly rejected, the District Court in the Northern District of Texas held that claims under the FMLA are claims that arise under the laws of the United States and are therefore subject to removal under federal question jurisdiction. Thus, the court denied employee's motion to remand and stated that the court would hear employer's pending motion to dismiss should employee decide to maintain her FMLA claims.

***Cruthirds v. Lacey*, No. 5:14-CV-00260-BR, 2017 WL 2242868 (E.D.N.C. May 22, 2017)**

Employee worked for the Directorate of Family, Morale, Welfare and Recreation, a directorate of the United States Department of the Army, in a number of positions as a Non-Appropriated Fund ("NAF") employee. Employee brought suit against her former employers – including a number of individually named public employees – alleging that they improperly denied her FMLA leave. Employers filed a motion to dismiss employee's FMLA claim under Rule 12(b)(1), arguing that the court lacked subject matter jurisdiction over employee's FMLA claim because of sovereign immunity.

The FMLA distinguishes between two types of employees, governed by either Title I or Title II of the FMLA. Only those employees governed by Title I – which covers private employers and certain federal employees – May bring a private right of action against their employers for violations of the FMLA. Title I of the FMLA covers only those federal employees whose leave is not governed by Title II, which covers federal service employees who have worked more than 12 months in civil service, are not postal employees, and do not meet the narrow exceptions identified in 5 U.S.C. § 6381 *et seq.*

In relying on Fourth Circuit precedent, the court concluded that, as an NAF employee, employee fell within the scope of Title II and had no jurisdiction to file suit against the

Department of the Army. With respect to whether public employees can be sued in their individual capacities under the FMLA, the court acknowledged a lack of Fourth Circuit precedent and a split among the district courts. However, the court noted that district courts have only found that FMLA liability can attach to public employees as individuals where employee's claim was governed by Title I, and the court concluded that employees covered by Title II are not entitled to a private right of action as to individuals. Accordingly, the court found that sovereign immunity precluded employee from bringing an FMLA claim against any of the named employers given that employee's claims were covered by Title II, and the court dismissed employee's FMLA claim for lack of subject matter jurisdiction.

Summarized elsewhere:
Henderson v. Enters., No. 4:15-cv-01522-SGC, 2017 WL 951722 (N.D. Ala. Mar. 10, 2017)

B. Arbitration

1. Introduction

2. Individual or Employer-Promulgated Arbitration Agreements and Plans

3. Arbitration Under a Collective Bargaining Agreement

III. Remedies

A. Damages

Perry v. Isle of Wight Cnty., No. 2:15-cv-204, 2017 WL 3446025 (E.D. Va. Aug. 10, 2017)

Employee, a county employee, sued her former employer, a county government, alleging that employer retaliated against her and failed to reinstate her in violation of the FMLA, after she failed to return to work on the date that her FMLA leave expired. Employee sought lost salary and benefits, liquidated damages, and front pay. The case proceeded to a bench trial. The court found in favor of employee and awarded damages. The court held that the termination was unlawful because under the FMLA and associated regulations, employee could extend or modify the length of her existing FMLA leave. The court determined that employee's extended leave was unforeseen and that employee timely and properly notified employer of her need for three additional days of leave. Thus, the court held that employer violated employee's rights under the FMLA when it terminated her employment.

The court awarded employee damages for lost salary and benefits, liquidated damages, and front pay. As to lost salary and benefits, the court held that employee attempted to mitigate her damages by applying to 75 or more positions, yet was not able to secure new employment. Second, as to liquidated damages, the court rejected employer's argument that its decision to terminate employee was made in good faith and, therefore, liquidated damages were not available. Specifically, the court held that employer acted unreasonably and not in good faith because it did not comply with its practice of "actively reaching out to their employees to avoid any voluntary resignations" at the end of an FMLA period. Finally, the court awarded front pay and benefits in an amount equaling two years because employee's position had been filled, making reinstatement infeasible, and the court determined that it was unlikely that employee could obtain comparable employment.

Summarized elsewhere:
***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

***Crain v. Schlumberger Tech. Co.*, No. CV 15-1777, 2017 WL 713673 (E.D. La. Feb. 23, 2017)**

1. Denied or Lost Compensation

***Dallefeld v. The Clubs at River City, Inc.*, No. 1:15-cv-01244-JES-JEH, 2017 WL 4621775 (C.D. Ill. Oct. 16, 2017)**

Employee worked as a salesperson for employer. His medical care provider sent two letters, the first dated March 26 and the second June 4, to employer stating that employee could not work. Two days before the second letter, employee's supervisor advised him to get knee surgery. On June 13, employer mailed employee a letter terminating him. At no time did employer ever offer employee the opportunity to take FMLA leave. Employee sued employer for interference and retaliation under the FMLA. Employee sought relief in the form of back pay, prejudgment interest, liquidated damages and front pay. The court granted employer's motion for judgment on employee's claim for retaliation, but a jury returned a verdict in favor of employee on his interference theory.

In calculating the amount of back pay owed, the court ruled that June 4 was the time in which employee's 12-week FMLA allotment began running, making September 4 the day when his FMLA leave expired. This was important because employee could have returned to work on August 13, but on modified duty, and was thus was willing and able to resume his job duties before his 12-week entitlement ran out. His termination therefore constituted interference with his rights under the FMLA. The court, however, reduced employee's prayer of $147,414.46 for backpay to $12,846.84. It did so by limiting the period of his recovery to 12 weeks and multiplying that by employee's $128.22 daily backpay figure. The court also awarded employee $1,430.62 in prejudgment interest over a period of 3.2 years, which was the time between June 4 and the jury's verdict. The amount was determined by multiplying the average prime rate (3.48%) by the backpay award by 3.2 years. Employee was not entitled to liquidated damages or front pay. As to the former, employer demonstrated sufficient good faith to disqualify employee from that relief. This was because employee was made aware of his FMLA rights upon hiring, his supervisor encouraged him to obtain knee surgery, that the supervisor was a decent person, employer paid for some of the leave employee took despite learning that employee was in Florida during that time, and the general good working relationship between the two. Front pay was not appropriate because employee failed to demonstrate that he could return to work after his FMLA leave ended on September 4. While his medical care provider authorized him to resume working, that was on a modified basis. Because the FMLA does not recognize light duty under the FMLA, an employer can terminate an employee if he or she does cannot perform the duties of his or her job when their FMLA leave ends. The court also denied recover for cell phone costs, vacation pay, gym membership, and option dental insurance.

***Lovely-Coley v. D.C.*, 255 F. Supp. 3d 1 (D.D.C. 2017)**

Employee was a detective at the District of Columbia Metropolitan Police Department who sued the District of Columbia for allegedly interfering with her FMLA rights and retaliating against her for requesting FMLA leave. Employee requested FMLA leave on three different

occasions in 2010 to care for her daughter who was battling cancer. Employer denied employee's first two applications for leave and only approved employee's third application two months after it was submitted. As a result, employee was forced to use 112 sick and annual leave hours between the time her first request for leave was submitted and the time her third request for leave was approved. In addition, employee asserts that following her complaint to the police department's Equal Employment Opportunity Office in 2010 regarding the denials of her requests, the department gave her two low performance reviews that rendered her ineligible for promotion. Employer moved for summary judgment on the grounds that employee was not prejudiced by its actions, meaning that employee did not suffer any compensable harm as a result of its conduct. The district court disagreed and denied employer's motion for summary judgment. Thereafter, employer filed a motion for reconsideration based on new information uncovered during settlement negotiations.

Employer argued that employee could not establish that she was prejudiced by its conduct because, at the relevant time, the department had no paid family leave program and had instituted a promotional freeze. As such, employee could not have suffered any compensable harm as a result of any alleged interference or retaliation under the FMLA because first, there was no separate bank of paid family leave for the employee to use, and second, she could not have been promoted even if she had not been given poor performance reviews due to the promotional freeze. Employee would have had to use the same number of sick and annual leave hours under the policy in existence at the time, and would not have been able to advance to a more senior position regardless of the outcome of her performance reviews. Further, had FMLA leave been available to employee, it would have been without pay. Instead, employee received compensation for taking sick and annual leave. It would not be just to restore employee's sick and annual leave hours without requiring employee to reimburse employer for the compensation she received during her leave because, otherwise, she would receive a windfall. Upon reconsideration of these new facts, the district court granted the employer's summary judgment because employee could not show that she suffered any compensable injury.

Summarized elsewhere:
***Dallefeld v. The Clubs at River City, Inc.*, No. 1:15-cv-01244-JES-JEH, 2017 WL 4621775 (C.D. Ill. Oct. 16, 2017)**

***Lovely-Coley v. D.C.*, 255 F. Supp. 3d 1 (D.D.C. 2017)**

***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-cv-00092-JCN, 2017 WL 1961567 (D. Me. May 10, 2017)**

***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

2. Actual Monetary Losses

Summarized elsewhere:
***Dallefeld v. The Clubs at River City, Inc.*, No. 1:15-cv-01244-JES-JEH, 2017 WL 4621775 (C.D. Ill. Oct. 16, 2017)**

***Lovely-Coley v. D.C.*, 255 F. Supp. 3d 1 (D.D.C. 2017)**

***Dulany v. Brennan*, No. 16-CV-149-JHP-FHM, 2017 WL 991070 (N.D. Okla. Mar. 14, 2017)**

***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

3. Interest

Summarized elsewhere:
***Dallefeld v. The Clubs at River City, Inc.*, No. 1:15-cv-01244-JES-JEH, 2017 WL 4621775 (C.D. Ill. Oct. 16, 2017)**

***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-cv-00092-JCN, 2017 WL 1961567 (D. Me. May 10, 2017)**

***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

4. Liquidated Damages

Summarized elsewhere:
***Dallefeld v. The Clubs at River City, Inc.*, No. 1:15-cv-01244-JES-JEH, 2017 WL 4621775 (C.D. Ill. Oct. 16, 2017)**

***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

a. Award

***Boadi v. Ctr. for Human Dev., Inc.*, No. 14-cv-30162-KAR, 2017 WL 4181347 (D. Mass. Sept. 21, 2017)**

Employee suffered a mental breakdown and was hospitalized as a result. Her son contacted her employer to inform it of employee's situation. After calling in for three days, employer instructed the son to stop calling. Employer subsequently terminated employee for no-call/no-show after it had barred employee's son from calling, and while it knew employee was hospitalized. Employee filed suit under the FMLA, and a jury found in her favor.

The district court then considered employee's entitlement to liquidated damages and front pay under the FMLA. The court easily concluded employer failed to carry its burden to show that it had acted in good faith and had reasonable grounds for its actions. First, employer failed to seek legal advice. Second, employer proactively barred employee's son from continuing to provide it with updates on employee's condition and her inability to work, and made no attempt to determine whether employee was able to provide information regarding her condition and inability to work to employer.

The district court denied employee's claim for front pay because employee failed to present any evidence of her current availability to work, or the present value of her future wages. In addition, the court found that employee's request for 10 years of front pay was approximately equal to the four years of back pay, and four years of liquidated damages that she received.

***Dorr v. Woodlands Senior Living of Brewer*, LLC, No. 1:15-cv-00092-JCN, 2017 WL 1961567 (D. Me. May 10, 2017)**

After a jury found in favor of employee on her FMLA claims against employer, employee filed a motion for supplemental relief with the court. The jury had found that employer discriminated against employee because of a disability and that employer interfered with employee's right to take FMLA leave. In light of the jury's findings, employee asked the court for, among other relief, reinstatement of her position with employer, injunctive relief, liquidated damages, and interest.

Under the FMLA, a court May grant equitable relief in the form of reinstatement. Similarly, the Civil Rights Act of 1964 and the Americans with Disabilities Act authorize the court to order reinstatement where an employer discriminated against an employee on the basis of employee's disability. In the First Circuit, one of the factors relevant to a reinstatement analysis is whether the discharged employee has found comparable work. The court denied employee's request for reinstatement, noting that employee held a comparable, better-paid position than the one she had held with employer prior to her termination.

With respect to the requested injunctive relief, the court declined to order employer to change its policies and provide additional training to its managers, finding that employer's policies and training were sufficient. However, the court did order employer to document when training was provided and to whom it was provided. The court also ordered employer to modify employee's personnel records – which stated that employee had abandoned her job – to reflect that employer unlawfully terminated employee's employment.

The court granted employee's request for liquidated damages, finding that both state and federal laws provided a basis for this award. The court held that liquidated damages were merited under the FMLA because employer did not act in "good faith" or have "reasonable grounds" for its FMLA violation, both of which would need to be shown by an employer in order to escape an order for liquidated damages. The court ordered that liquidated damages be paid based on lost wages rather than on the per diem assessment allowed for by state law. Lastly, the court found that employee was entitled to pre- and post-judgment interest, and the court ordered that pre-judgment interest for lost wages be calculated up through the date on which she began her new employment.

Summarized elsewhere:
***Dallefeld v. The Clubs at River City, Inc.*, No. 1:15-cv-01244-JES-JEH, 2017 WL 4621775 (C.D. Ill. Oct. 16, 2017)**

***Crain v. Schlumberger Tech. Co.*, No. CV 15-1777, 2017 WL 713673 (E.D. La. Feb. 23, 2017)**

b. Calculation

Summarized elsewhere:
***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-cv-00092-JCN, 2017 WL 1961567 (D. Me. May 10, 2017)**

5. Other Damages

Summarized elsewhere:
***Canigiani v. Banc of Am. Merch. Servs., LLC*, No. 17-cv-61270, 2017 WL 4390170 (S.D. Fla. Oct. 3, 2017)**

***Fabian v. St Mary's Med. Ctr.*, No. 16-4741, 2017 WL 3494219 (E.D. Pa. Aug. 11, 2017)**

***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-cv-00092-JCN, 2017 WL 1961567 (D. Me. May 10, 2017)**

***Hargett v. Jefferson Cnty. Bd. of Educ.*, No. 3:14-cv-00869-CRS-CHL, 2017 WL 939326 (W.D. Ky. Mar. 9, 2017)**

B. Equitable Relief

Summarized elsewhere:
***Gardner v. Summit Cnty. Educ. Serv. Ctr.*, No. 5:15CV1270, 2017 WL 979120 (N.D. Ohio Mar. 14, 2017)**

1. Equitable Relief Available in Actions by the Secretary

2. Equitable Relief Available in all Actions

a. Reinstatement

***Drummer v. Trustees of Univ. of Pa.*, No. CV 16-2982, __ F. Supp. __, 2017 WL 6336474 (E.D. Pa. Dec. 11, 2017)**

Employee brought suit against employer, alleging multiple causes of action, including violation of the FMLA. Employer moved to dismiss, stating that all claims were insufficiently alleged. Employee worked for employer as a secretary. Around March 2015, the human resources department recommended to employee that he take a leave of absence due to personal problems he was having at home. At some point shortly thereafter, employee made a formal request for FMLA leave. Although employee stated his request was denied, the record showed he did take time off from work, because of a letter he received from employer in June 2015 indicating that if he did not promptly respond to the letter, he would be terminated. Employee responded to the letter and reported back to work on June 10, 2015. On that day, employer terminated him for performance issues in March 2015.

In its motion to dismiss, employer contended that it did not deny employee leave because, notwithstanding his allegation that employer had done so, his amended complaint – as a whole – showed he took leave from March to June 2015. The court argued that even if employee had been granted FMLA leave, employer's failure to reinstate employee to the same or an equivalent position once he returned from leave could constitute the basis for an FMLA interference claim if all other elements of the claim were satisfied. Because employer had not challenged any other parts of employee's claim, the court denied employer's motion to dismiss.

***Cardenas v. Taco Bell KFC*, No. 2:17-CV-00203-GZS, 2017 WL 3670660 (D. Me. Aug. 25, 2017)**

Employee brought suit *in forma pauperis* against employers, alleging that employers sent her home from work when suffered from a medical condition because she could not see the computer. Employee contended she was medically restricted at the time, and sought compensatory damages and reinstatement to her position. On July 19, 2017, the magistrate judge recommended that the court dismiss the complaint unless employee amended her complaint to state an actionable claim under the FMLA.

On July 31, employee filed an additional pleading, which was docketed as an amended complaint. The magistrate judge again recommended dismissal, because employee had failed to assert she was capable of performing the essential functions of her job either with or without a reasonable accommodation. Because employee had not alleged facts to support her being reinstated to her position under the FMLA, the magistrate judge stated that dismissal of the amended complaint was warranted.

***Sampra v. Dep't of Transp.*, No. 16 C 4391, 2017 WL 2573211 (N.D. Ill. June 14, 2017)**

Employee Sara Sampra sued employer the U. S. Department of Transportation for interfering with her rights under FMLA after she took leave to care for her newborn baby. Employee was a field engineer for the FAA. She performed most of her duties at the field office near her home because of assignments given her by her then-current supervisor. One of the main questions was whether, as a field engineer, she would be required to spend some or most of her time in the field at several airports, impacting her ability to care for her child. Employee took FMLA leave for nine weeks after her baby's birth. During her leave, her supervisor changed. She asked prior to returning to work if she could telework for an additional four weeks. Employer denied this request, stating that no telework was available. In consideration of employee's child care issues, employer allowed her to work during the day at O'Hare Airport, near her home but not as close as her field office where she had worked previously. Employee did not find this accommodation helpful in solving her child care issues. So, she requested a reassignment to a drafting coordinator position, which was granted. She received the same pay as a field engineer.

The trial court granted employer's summary judgment motion, finding that employee had been reinstated to an equivalent position. Employee argued that, prior to her leave, she had done virtually all of her work in the office and did not have to travel to other airports, so she should have been reinstated to the same position. The court rejected this argument, finding that, as a field engineer, employee could always have been assigned a position requiring travel.

***Ibewuike v. Johns Hopkins Hosp.*, No. WMN-15-1630, 2017 WL 2131842 (D. Md. May 17, 2017)**

Employee, a registered nurse, applied for FMLA leave to begin in Autumn 2012 in anticipation of the birth of her child. Her application was approved. After experiencing complications with her pregnancy, employee asked that her FMLA leave commence in Spring 2012 rather than the fall. Her application was approved. Employee's child was born prematurely on May 12, 2012. On June 5, 2012, just prior to the end of her FMLA leave, employee's manager sent her a letter offering her the opportunity to apply for an extended

medical leave of absence, under employer's Leaves of Absence Policy ("LOA Policy"), which would entitle her to up to six months of free medical and dental insurance during the leave period. On June 9, 2012, employee acknowledged, by signing the LOA Policy request form, that she understood the policy. On June 11, 2012, employee's doctor told her she would need to be on light duty for the next six weeks. On June 12, 2012, employee gave the doctor's work restriction form to her manager, who said the hospital had no light duty assignment available to her. On June 13, 2012, employee gave her manager the LOA Policy request form, which her manager signed. On June 18, 2012, employee commenced work at Levindale Hebrew Geriatric Center. Around July 10, 2012, employer learned that employee had accepted work at Levindale, without permission, in violation of its LOA Policy, and on July 12, 2012, terminated her.

Employee filed a complaint against employer, claiming it had interfered with her FMLA rights and retaliated against her for taking FMLA leave. Employer filed a motion for summary judgment. The court stated that employee appeared to argue that the hospital had failed to reinstate her but "'[a]n employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.' 29 C.F.R. § 825.216(a). 'If the employee is unable to perform an essential function of the position because of a physical or mental condition, ... the employee has no right to restoration to another position under the FMLA.' *Id.* at 825.216(c)." Employee's retaliation claim was based on her contention that she was terminated on June 12, 2012 (when she was told there was no light duty assignment available to her) and that employer terminated her in retaliation for having taken FMLA leave. Employer argued that employee was terminated in July 2012, because she had violated its LOA Policy. The court said that rather than terminating her in June, the hospital permitted her to apply for extended leave with free health insurance and that employee signed the form! Employee's own conduct proved she didn't believe she was terminated in June, and she was only trying to establish that she was terminated in June, rather than July, because she knew she could not show that the July termination was pretextual.

In attempting to establish pretext, employee said she had previously engaged in dual employment while working for employer, and thought it was allowed. The court stated the Leaves of Absence Policy made it clear "[i]f the employee fails to disclose or misrepresents dual employment during leave, he/she will be terminated as having abandoned his/her position." Ruling that employer had offered a legitimate, nonretaliatory reason for terminating employee, and employee had failed to establish pretext, the court granted employer's motion.

***Harper v. Fort Bend Indep. Sch. Dist.*, No. H-16-1678, 2017 WL 1881971 (S.D. Tex. May 9, 2017)**

Employee, who worked as an Assistant Director for the School District, filed suit against the District for violating the FMLA by interfering with her FMLA leave and retaliating against her for taking FMLA leave. In December 2014, employer developed a plan to split employee's Assistant Director position into two coordinator positions. In January 2015, employee told employer she planned to take FMLA leave for foot surgery. In February 2014, employer offered employee a coordinator position, which had a lower salary than employee's current position, and gave employee till March 4, 2015 to inform employer whether she would accept the coordinator position. Employee did not respond. On March 5, 2015, employee commenced FMLA leave and remained on leave till June 9 of that year. Employer posted the coordinator position that employee had been offered but did not take on its website. When she returned, employer told

employee that because her position was being eliminated and she had not taken the coordinator position, her last day of work would be June 30, 2015.

Employee's FMLA retaliation claim was dismissed because employer's decision to restructure had been made before her protected activity occurred. Employer then filed a motion for summary judgment on employee's FMLA interference claim. Employee did not respond to employer's summary judgment motion, which – according to the court – "likely abandon[ed] the claim," but the court chose to discuss the merits of employer's summary judgment motion "in the interest of thoroughness." Employee alleged that employer interfered with her FMLA rights by refusing to reinstate her to a similar position when she returned to work in June 2015. The court said the facts on the record undermined this claim. When employee returned from leave, she continued to hold her Assistant Director position till the end of the fiscal year, when the position was eliminated. Employee also alleged that employer interfered with her FMLA rights by terminating her shortly after she returned from FMLA leave. The court said the facts also refuted this claim. Employer decided in December 2014 to eliminate the Assistant Director position, but employer did not learn of employee's impending FMLA leave till January 2015. The court quoted the FMLA (29 U.S.C. § 2614(a)(3)(B)) as stating that employee was not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." The court granted employer's motion for summary judgment on employee's FMLA interference claim.

Summarized elsewhere:
***Cruz v. Tex. Health & Human Servs. Comm'n*, No. 1:16-cv-072, 2017 WL 3605234 (S.D. Tex. Aug. 22, 2017)**

***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-cv-00092-JCN, 2017 WL 1961567 (D. Me. May 10, 2017)**

b. Front Pay

Summarized elsewhere:
***Boadi v. Ctr. for Human Dev., Inc.*, No. 14-cv-30162-KAR, 2017 WL 4181347 (D. Mass. Sept. 21, 2017)**

***Perry v. Isle of Wight Cnty.*, No. 2:15-cv-204, 2017 WL 3446025 (E.D. Va. Aug. 10, 2017)**

c. Other Equitable Relief

C. Attorneys' Fees

***Watson v. Cnty. of Yavapai*, 240 F. Supp. 3d 996 (D. Ariz. 2017)**

A district court in Arizona granted employer's motion for award of attorneys' fees and non-taxable costs based on a frivolous claim. Employee injured her back and neck in a car accident four years after beginning work for employer. She sought and was provided with accommodations at work. In February 2013, she received disciplinary action for missing a professional workshop. A month after that, employee began taking FMLA leave due to increased back pain. It was not disputed that employer granted her FMLA leave on all occasions except one day scheduled for a discharge meeting. She was never disciplined for taking the

leave. Following her termination, employee brought a claim of retaliation under the FML and also a claim of interference with her right to take FMLA leave. The court granted employer's motion for summary judgment. Then, the court granted the award of fees and costs against employee in the amount of $106,169.93 plus interest.

***Dallefeld v. The Clubs at River City, Inc.*, No. 115CV01244JESJEH, 2017 WL 5907471 (C.D. Ill. Nov. 30, 2017)**

Employee prevailed at trial on one of multiple claims that employer violated the FMLA after he was terminated while recovering from a knee injury and surgery. The parties stipulated that if employee prevailed, the court would determine his entitlement to lost compensation, interest, liquidated damages, front pay, and attorneys' fees. Employee filed a motion for damages in excess of $417,000, which the court modified to $12,846.84 in back bay and benefits and $1,430.62 in prejudgment interest. Shortly thereafter, employee filed a petition for attorneys' fees and litigation costs in the amount of $108,994.32.

The United States District Court for the Central District of Illinois examined employee's petition under the "lodestar method," which requires consideration of the number of hours expended multiplied by a reasonable hourly rate. According to the court, "critical" to that analysis is the degree of success by the prevailing party. Thus, it stated: "In light of the Plaintiff's failure to obtain a favorable verdict in a decisive majority of his claims, the court finds that a reduction is appropriate." Consequently, the court reduced the amount for fees and costs in employee's petition by 40%, to a total of $46,265.07.

***Boadi v. Ctr. For Human Dev., Inc.*, No. 14-CV-30162-KAR, 2017 WL 5178791 (D. Mass. Nov. 8, 2017)**

After receiving a jury verdict regarding FMLA claims, employee brought suit under 29 U.S.C. § 2617(a)(3) for the recovery of attorneys' fees and costs. Employee's counsel submitted 34 pages of invoices itemizing the amount of time spent on specific tasks. The court, using the lodestar approach, denied employer's allegation of block billing and request to reduce employee's attorneys' fee award on that basis. The court granted employer's application to have clerical tasks billed at a paralegal's hourly rate, rather than an attorneys' hourly rate. Since employee's claims were based on a common set of facts, the court also refused to reduce employee's award for time spent on unsuccessful claims.

However, the court reduced employee's award for the time spent at proceedings before the state commission against discrimination. The court noted that unlike an employee alleging employment discrimination, who must file an administrative claim with the EEOC or with the parallel state agency before a civil action may be brought, employee had no similar requirement to pursue an administrative remedy prior to filing an FMLA claim in federal court. The court also reduced the hours expended by employee's counsel for preparation of an ADR hearing which employee canceled at the last minute. The court also reduced employee's award for work done by employee's new counsel as duplicative. However, the court refused to reduce employee's award for attorney fees associated with accompanying employee to the emergency room when employee became ill during her deposition or for fees associated with employee's attorney learning courtroom technology in preparation of the trial. Expert fees and costs, including postage, copies, and parking were viewed as reasonable by the court.

Summarized elsewhere:
***Wink v. Miller Compressing Co.*, 845 F.3d 821 (7th Cir. 2017)**

D. Tax Consequences

IV. Other Litigation Issues

Summarized elsewhere:
***Titus v Miami Dade Cnty.*, No. 16-24000-Civ, 2017 WL 4465785 (S.D. Fla. Sept. 29, 2017)**

***Henderson v. Enters.*, No. 4:15-cv-01522-SGC, 2017 WL 951722 (N.D. Ala. Mar. 10, 2017)**

***Quintiliani v. Concenctric Healthcare Sols., LLC*, No. 1 CA-CV 15-0816, 2017 WL 4288032 (Ariz. App. 1st Div. Sept. 28, 2017)**

A. Pleadings

***Craft v. Burris*, No. 16-166-BLG-TJC, 2017 WL 4891520 (D. Mont. Oct. 30, 2017)**

Employee, who worked at employer's mine in Montana, alleged that employer denied and interfered with his FMLA rights and retaliated against him for exercising those rights. Employer moved to dismiss, and the District Court of Montana granted the motion. The court pointed out that the Ninth Circuit has held that the FMLA's anti-retaliation provision does not cover negative consequences just because employee used FMLA leave; rather, retaliation claims cover cases where an employee is punished for opposing unlawful practices by the employer. The court thus held that employee failed to state a claim for retaliation given that he did not allege that employer either punished him for opposing unlawful practices, or discriminated against him for instituting or participating in FMLA proceedings or inquiries.

The court also held that employee failed to state a claim for interference under the FMLA, because employee did not allege any facts from which the court May reasonably infer that he is an eligible employee or that his employer is covered under the FMLA, such as how long he was employed, the number of hours he worked, or how many people employer employs. Furthermore, employee did not allege any facts establishing a relationship between him exercising his FMLA rights and his termination.

In terms of employee's claims against his supervisors individually, the court held that his complaint contained only bare assertions that were nothing more than a formulaic recitation of the elements of the claim, and therefore were not sufficient to state a claim.

***Arrington v. Ala. Power Co.*, No. 2:16-cv-01355-JEO, 2017 WL 4340443 (N.D. Ala. Sept. 29, 2017)**

A black female employee of a power company who claimed constructive discharge, filed a complaint asserting, in rambling fashion, that she was discriminated against on the basis of race, that employer had failed to accommodate her after she asserted a workplace claim for asthma due to mold exposure, and that employer had interfered with her FMLA rights. The magistrate judge granted employer's motion to dismiss, holding among other things that her FMLA interference claim failed due to a lack of specific allegations. She did not offer evidence

showing that employer had denied her leave or retaliated against her for taking leave. She did not demonstrate that employer removed her from a supervisory role because of her asthma.

***Harris v. Cmty. Action P'ship of N. Ala.*, No. 6:12-mc-3917-SLB, 2017 WL 4155103 (N.D. Ala. Sept. 19, 2017)**

Application to proceed *in forma pauperis* denied where sole FMLA-related allegation was that employee was "denied reasonable [accommodation], FMLA." Court found leave to amend futile where Complaint also contained no allegations relating to employee's eligibility for FMLA, that her employer was covered by the FMLA, or that employee was denied any specific FMLA benefit.

***Arora v. Henry Ford Health Sys*., No. 2:15-cv-13137, 2017 WL 4119946 (E.D. Mich. Sept. 18, 2017)**

Employee, proceeding *pro se*, filed a Motion for Leave to Amend the complaint against employers, seeking to add, *inter alia*, claims that employers fraudulently concealed their interference with her rights under the FMLA and violated the FLSA by failing to provide notice of the FMLA and subsequently terminated employee a few months after a surgery that resulted in a disability. In considering employee's claims for the alleged FMLA violations, the district court dismissed the case with prejudice, finding that the amended pleadings lacked the facts necessary to raise a right to relief above a speculative level and were time-barred as the case was filed more than six years after the last alleged violation.

***Davis v. Oliver St. Dermatology Mgmt.*, LLC, No. 17-CV-0250-FJG, 2017 WL 3494231 (W.D. Mo. Aug. 15, 2017)**

Employee filed suit in state court against her former employer after she was terminated following a return from an intensive outpatient program to recover from depression and anxiety. Employer then removed the complaint, which employee subsequently dismissed. Employee later filed an amended complaint in state court, which employer again removed to federal court on the ground that employee's allegations, though only pleading three state law counts, actually stated a claim for FMLA retaliation. In response, employee filed a motion to remand, which the court granted.

As a threshold matter, the court explained that even though employee's original complaint mentioned the word "FMLA," that alone did not turn adequately pleaded state law claims into a federal question. The court then looked to the elements of employee's Missouri Human Rights Act ("MHRA") claim for retaliation – "(1) the employee complained of an MHRA-prohibited activity, (2) the employer took an adverse employment action, and (3) a causal connection exists between the complaint and adverse action" – to determine whether a federal question was presented. The court explained that the elements of the state law claim did not require the factfinder to determine whether employee's FMLA rights were violated, and therefore, employee's claims did not raise a federal question. In doing so, the court also noted that several other courts have reached the same result.

***Cardenas v. Taco Bell KFC*, No. 2:17-cv-00203-GZS, 2017 WL 3054430 (D. Me. July 19, 2017)**

Employee brought suit *in forma pauperis* against employers, alleging that employers sent her home from work when suffered from a medical condition because she could not see the computer. Employee contended she was medically restricted at the time. Employee sought compensatory damages and reinstatement to her position. In accordance with the *in forma pauperis* statute, the magistrate judge granted a preliminary review of employee's complaint under 28 U.S.C. §1915(e)(2).

The judge recommended that the court dismiss the complaint unless employee amended her complaint to state an actionable claim. The judge reasoned that employee did not allege sufficient facts to state an actionable claim under the FMLA. Employee did not allege that she requested leave, or that she was either denied leave or the right to return to work after exercising any leave rights she might have had.

***Ponce v. City of Naples*, No. 2:17-cv-137-FTM-99CM, 2017 WL 2692829 (M.D. Fla. June 22, 2017)**

Manuel A. Ponce (employee), a fifty-three year old Hispanic male of Cuban descent, sued his former employer of twenty-seven years, the City of Naples, alleging violations under numerous theories, including the FMLA. From 2013 to the time of his discharge, employee suffered from numerous ailments, including surgical repair of his shoulder. Employee was on FMLA leave for five months due to the surgery. Upon his return, employee alleged that he was not reinstated with the terms and conditions equivalent to those he had before he took leave in violation of his rights under the FMLA. Employer filed a Motion to Dismiss the FMLA cause of action for failure to plead sufficient facts. The court dismissed, with leave to amend, the FMLA cause of action because employee failed to allege facts to support his claim that his post-leave position at the City was not equivalent to his pre-leave position.

***Bradford v. Prosoft, LLC*, No. 3:16-CV-00373-CRS-DW, 2017 WL 1458201 (W.D. Ky. Apr. 24, 2017)**

Employee, a studio production artist, brought suit against two alleged employers, Prosoft and Humana, for FMLA interference and retaliation. Immediately after employee began employment with Prosoft, he "contracted for employment" with Humana. After four months of employment, employee, a transgender person, first disclosed that he was transgender when he informed his supervisor that he needed to undergo a hysterectomy because of his endometriosis and severe abdominal paid. Approximately one year later and one month before surgery, employee requested two weeks of medical leave, to work from home while recovering from surgery, and FMLA paperwork. Employee provided a physician's note that verified the scheduled surgery and documented his request for leave and accommodation to work from home. About two weeks before the scheduled surgery, employer, through its creative director, informed employee that employer would not accommodate his request for medical leave and that he would be terminated for leaving for his scheduled surgery. Employer denied employee's request for FMLA leave. One work day before the scheduled surgery, employer terminated employee's employment.

Defendants filed motions for judgment on the pleadings with the district court in Kentucky. Defendant Prosoft argued that the complaint failed to allege facts that would demonstrate that employee was an eligible employee, that it was an employer, or that employee notified it of his FMLA claim. Because employee alleged that he began his employment with Prosoft in January 2015, that Prosoft was his employer within the meaning of the FMLA, and he notified Prosoft of the date scheduled for his surgery, the district court denied Prosoft's motion.

Defendant Humana argued that all claims against it failed because employee failed to allege that it was employee's employer. Because employee alleged sufficient facts to show that Humana and Prosoft acted as joint employers and courts have permitted FMLA claims to proceed against entities that did not directly employ employees under the joint employer theory, the district court denied Humana's motion.

***Guerrero v. Denver Health & Hosp. Auth.*, No. 17-CV-00117-RBJ, 2017 WL 1074710 (D. Colo. Mar. 22, 2017)**

Employee brought suit against her employer for retaliatory constructive discharge in Denver District Court. Specifically, employee's complaint alleged that she "exercise[ed] her rights under the FMLA," and suffered retaliation from her employer "in part" because of her decision to exercise her FMLA rights. Employer filed a notice of removal arguing that employee's retaliation claim arose under federal law because it referenced the FMLA, which in turn gave the federal court original jurisdiction. In response, employee filed a motion to remand the case back to Denver District court arguing her retaliation claim did not arise under federal law, making removal improper.

The District Court for the District of Colorado granted employee's motion to remand back to the District Court for the City and County of Denver. The court reasoned that although employee's claims could state a claim under the FMLA, they could also support a common law claim for retaliation as well. Furthermore, the court held that remand was appropriate because of the ambiguity in whether employee pleaded a state or a federal law claim.

***Murphy v. McLane E., Inc.*, No. 3:16CV1055, 2017 WL 770653 (M.D. Pa. Feb. 28, 2017)**

A manufacturing employee claimed that his employer wrongfully terminated him in violation of the FMLA. The company argued that employee failed to state a claim upon which relief could be granted. The United States District Court for the Middle District of Pennsylvania granted dismissal as to employee's interference claim and denied it as to the retaliation claim.

After passing out at work, employee took two FMLA days. Once employee returned to work, a female employee accused him of touching her in an inappropriate manner. The company terminated employee for the inappropriate conduct and never disciplined or took adverse action against employee for taking FMLA leave. Because employee did not specifically aver that he was disciplined for taking FMLA leave, employee was unable to satisfy the fifth element of an interference claim – that employer denied employee FMLA benefits.

On the retaliation claim, employer argued that employee failed to adequately plead the existence of a causal connection between his FMLA leave and his termination. The Third Circuit requires supplementary evidence of retaliatory motive if the temporal proximity is greater than ten days, which it was here. Viewing the complaint as a whole and construing the

allegations most favorably toward employee, the court held that employee satisfied his initial burden.

***Gilliam v. Joint Logistics Managers, Inc.*, No. 4:16-cv-04077-SLD-JEH, 2017 WL 758459 (C.D. Ill. Feb. 27, 2017)**

Employee brought suit against his employer for violating his FMLA rights when it allegedly terminated employee for his attempts to exercise FMLA leave. Employer moved to dismiss the Complaint on the grounds that employee had failed to plead that he was an eligible employee under the FLMA because he did not allege that he worked the requisite 1250 hours in the 12 months before his termination nor did he allege that employer maintained the requisite number of employees. In support of its Motion to Dismiss employer provided an affidavit stating that the facility where employee was employed did not employ more than 27 employees during the relevant time and that employer did not maintain any other facilities with the 75-mile radius. Employee failed to respond to or oppose the motion. The court found employee's Complaint was insufficient to state a claim upon which relief could be granted and based on the affidavit submitted by employer determined that amendment would be futile. Accordingly, the court granted employer's Motion to Dismiss with prejudice because under no circumstances would employee be able to make out any FMLA claims.

***Jennings v. Univ. of N.C.*, 801 S.E.2d 711 (N.C. App. 2017)**

On May 28, 2014, employer terminated employee due to unacceptable personal conduct. Employer made its decision to terminate employee during a disciplinary conference that was scheduled in employee's absence, while she was on FMLA leave. Employee filed a complaint for FMLA interference and retaliation. The district court granted employer's motion to dismiss.

Employee alleged that on January 10, she began approved leave pursuant to the FMLA; that during her leave, she was contacted regarding pre-disciplinary conferences; that on April 9, the date that her leave expired, she took unpaid leave; and that she was ultimately terminated. Employee contended that her employer's contacting her regarding a pre-disciplinary hearing during her FMLA leave constituted a violation of the FMLA. Employee did not allege that employer interfered with her FMLA leave or retaliated against her for taking FMLA leave, just that employer *contacted her while she was on leave*, and doing so violated her FMLA rights.

The court of appeals said, "'[a]n employer has discretion to discipline or terminate the employment of an at-will employee for poor performance regardless of whether the employer's reason for terminating the employment was discovered while the employee is taking FMLA leave.' *Mercer v. Arc of Prince Georges Cty., Inc.*, 532 F. App'x 392, 396 (4th Cir. 2013)." The mere fact that discipline was enacted while employee was on FMLA leave was not a violation of the statute. Employee had failed to state a claim for FMLA interference and FMLA retaliation. The court of appeals upheld the district court's ruling.

Summarized elsewhere:
***Drummer v. Trustees of Univ. of Pa.*, No. CV 16-2982, ___ F. Supp. ___, 2017 WL 6336474 (E.D. Pa. Dec. 11, 2017)**

***DeVoss v. Sw. Airlines Co.*, No. 3:16-CV-2277-D, 2017 WL 5256806 (N.D. Tex. Nov. 13, 2017)**

***Titus v Miami Dade Cnty.*, No. 16-24000-Civ, 2017 WL 4465785 (S.D. Fla. Sept. 29, 2017)**

***Cruz v. Tex. Health & Human Servs. Comm'n*, No. 1:16-cv-072, 2017 WL 3605234 (S.D. Tex. Aug. 22, 2017)**

***Green v. Orion Real Estate Servs., Inc.*, No. 4:16-CV-2575, 2017 WL 1710570 (S.D. Tex. May 3, 2017)**

***Dusik v. Lutheran Child & Family Servs. of Ill.*, No. 16 CV 10812, 2017 WL 1437045 (N.D. Ill. Apr. 24, 2017)**

***Jackson v. Cnty. of Sacramento Dep't of Health & Human Servs.*, No. 2:16-CV-0920 MCE GGH PS, 2017 WL 1375211 (E.D. Cal. Apr. 17, 2017)**

***Hibben v. Okla. ex rel. Dep't of Veterans Affairs*, No. 16-CV-111-TLW, 2017 WL 1239146 (N.D. Okla. Mar. 31, 2017)**

***Henderson v. Enters.*, No. 4:15-cv-01522-SGC, 2017 WL 951722 (N.D. Ala. Mar. 10, 2017)**

***Becton, II v. St. Louis Reg. Pub. Media, Inc.*, No. 4:16-CV-1419 CAS, 2017 WL 769900 (E.D. Mo. Feb. 28, 2017)**

B. Right to Jury Trial

***Griego v. Brennan*, No. 16-947 JCH/LF, 2017 WL 3397373 (D.N.M. Aug. 8, 2017)**

Employee filed suit against the United States Postal Service ("USPS") alleging, among other things, that her rights under the FMLA were violated. The question presented was whether plaintif was entitled to a jury trial of her FMLA claim. The district court found that the USPS is considered an arm of the executive branch of the United States government and entitled to the protection of sovereign immunity. There is no provision in the FMLA suppoting a right to jury trial against the United States. Accordingly, employee is not entitled to a jury trial.

C. Protections Afforded

***Laborde v. Mount Airy Casino*, No. 3:16-CV-769, 2017 WL 114085 (M.D. Pa. Jan. 11, 2017)**

In this case of FMLA discrimination, Magistrate Judge Carlson issued a Report and Recommendation (Report") refusing the Casino's Motion to dismiss the case for failure to state a claim. The Casino argued that it terminated employee because he allowed a patron to place bets in excess of the table maximum. However, viewing the allegations in the light most favorable to the employee, there was a reasonable inference that the employee was terminated because of his disability or his recent request and use of FMLA leave, which should be tested through the discovery process.

On appeal at 2017 U.S. Dist. LEXIS 4303 (M.D. Pa. January 11, 2017), Judge Mariani dismissed the Casino's objections to the Magistrate Judge's Report and allowed the litigation on the amended complaint to proceed.

D. Defenses

***Griffin v. Don E. Bower, Inc.*, No. 3:16-2412, 2017 WL 4310091 (M.D. Pa. Sept. 28, 2017)**

After learning of his son's leukemia diagnosis, employee notified his supervisor of his son's condition and the need for time off. While on leave, employee maintained contact with employer to provide updates regarding his son's condition and the anticipated return to work. While still on leave, employee's supervisor advised employee that he thought it would be "better for both he and the company if [the] [p]laintiff were laid off." Two weeks later, employee returned to work. He was told that his separation was a permanent termination and there would be no call back date to return.

Following his employment termination, employee filed a lawsuit alleging violation of the FMLA. Employer answered the complaint and asserted twenty-three affirmative defenses. Employee moved to strike fifteen of the affirmative defenses. The court granted in part and denied in part the motion to strike.

A court will strike an affirmative defense when the defense asserted could not prevent recovery under any set of pleaded or inferable facts. Further, a court will strike an affirmative defense where it is nothing more than a bare bones conclusory allegation. In striking certain affirmative defenses, the court ruled that they were not affirmative defenses but rather denials of allegations. While that May not ordinarily result in striking, the defenses also were redundant, which made striking them appropriate. The court struck other defenses solely on the grounds of redundancy because redundancy would confuse issues and duplicate work, among other reasons. The court struck several other affirmative defenses (i.e., accord and satisfaction, doctrine of payment, assumption of risk, doctrine of license and/or privilege) because they bore no relationship to an FMLA action and were not legally recognizable under the FMLA. As to the affirmative defense of doctrine of consent, the defense was stricken as there is no such defense under the FMLA. An employee cannot consent to a statutory violation. As to the affirmative defense of doctrine of release, the defense was stricken because there was no legal authority that receiving unemployment compensation constituted a release of an FMLA claim. As to a laches affirmative defense, employer conceded that the lawsuit was filed within six months of employee's termination and thus employee's complaint was clearly timely filed such that the defense could not apply. As to an equitable estoppel affirmative defense, the court struck this defense because the Third Circuit has recognized the availability of estoppel in an FMLA action. The court reasoned that in those decisions (which allowed an employee to assert an estoppel claim) would suggest that employee's entire FMLA claim would be barred. Further, if an employee cannot voluntarily waive an FMLA claim, then the court stated it would make little sense if employee could be estopped from asserting those same claims because employee's actions led employer to believe those claims were waived.

Summarized elsewhere:
***Henderson v. Enters.*, No. 4:15-cv-01522-SGC, 2017 WL 951722 (N.D. Ala. Mar. 10, 2017)**

1. Statute of Limitations

***Zisumbo v. Convergys Corp.*, No. 1:14-CV-134-RJS, 2017 WL 5634120 (D. Utah Nov. 22, 2017)**

Employee was sued in state court by a collections agency regarding unpaid medical bills. Employee then filed a third party complaint against employer, her former employer, asserting FMLA and ERISA claims. The case was removed to federal court. The issue before the court on the parties' cross motions for summary judgment was whether an employer May contractually restrict the statute of limitations for claims under the FMLA. The court held that, as a matter of public policy, the waiver was not enforceable regarding employee's FMLA claims. The waiver was, however, enforceable as to the ERISA claims.

As part of employee's job application with employer, employee signed an agreement that imposed a six-month limitations period for any employment-related claims. Employee brought her claims against employer within the FMLA's two-year limitations period, but beyond the six-month contractual period. The parties filed cross motions for summary judgment. The court determined that there was no binding Tenth Circuit precedent on the issue, but that a majority of district courts have held that such a waiver is not enforceable regarding FMLA claims. The court sided with the majority of district courts and held that "the FMLA provides rights to employees" and that employer's waiver "interferes with those rights, and consequently runs afoul of the FMLA's proscription on interfering with rights under the FMLA." Thus, the court denied employer's motion for summary judgment and allowed employee's FMLA claims to proceed.

***English v. Estes Express Lines*, No. 516CV01353CASSKX, 2017 WL 5633037 (C.D. Cal. Nov. 21, 2017)**

Employee worked for employer as a dock supervisor since March 1991. On January 10, 2014, employee did not report for work. He texted his supervisor to notify him that he was not feeling well and not coming in. On January 12, employee's next scheduled workday, employee did not report for work and sent his supervisor the same text as on January 10. On January 13, his supervisor's terminal manager called employee and left a voicemail, advising employee that if he was going to be absent from work for a third day, he would need to produce a doctor's note. On January 13 and 14, employee did not report for work and sent his supervisor the same text as on January 10 and 12. On January 14, after leaving several voicemails for employee, advising him that texts were insufficient and against company policy, the terminal manager left a voicemail for employee telling him he was being placed on immediate suspension. On the same date, the decision was made to terminate employee. On January 15, employee faxed employer a medical note from the Medical Clinic of Redlands, California stating that employee should be excused from work from January14 to January 20. In May 2016, employee filed a complaint against employer with several causes of action, including an FMLA retaliation claim. Employer moved for summary judgment, contending that the two-year statute of limitations for FMLA claims had expired in January 2016. The court disagreed that employee's FMLA claim was time-barred, because triable issues of fact existed as to whether employee was *willfully* terminated, in which case the statute of limitations was three years.

The court explained that "[t]o demonstrate a violation of the FMLA, an employee must prove that (1) he was eligible for the FMLA's protections, (2) his employer was covered by the

FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled. *Sanders v. City of Newport*, 657 F.3d 772, 778 (9th Cir. 2011)." Employer stated that employee's FMLA claim failed because he did not have a serious health condition, and because he had not provided sufficient notice of his intent to take leave. The court said genuine issues of material fact existed as to both issues and denied employer's motion for summary judgment.

***Titus v Miami Dade Cnty.*, No. 16-24000-Civ, 2017 WL 4465785 (S.D. Fla. Sept. 29, 2017)**

Employee worked as a pipefitter for public agency. He filed a complaint on September 17, 2016 alleging a retaliation claim under the FMLA. In his complaint, he contended that employer issued him a written reprimand on April 15, 2015 in response to protected activity he engaged in under the FMLA. While this would have been a timely claim under the FMLA's two-year statute of limitations, he did not include this reprimand in opposing employer's motion for summary judgment.

Instead, he only put in evidence a March 2014 reprimand he received from employer. The time in which to file suit based on this reprimand would have been March 2016. Because he filed his lawsuit six months after that time, his complaint was barred by the statute of limitations.

Employee also contended that his complaint should be construed as one stating an interference claim.

The court rejected employee's attempt to do so, explaining that liberal reading of pleadings such as his complaint did not apply at the summary judgment stage. If he wanted to state such a claim, he should have filed a motion to amend his complaint to add an interference theory to it. Because he did not, the court rejected his invitation to incorporate an interference theory into his complaint.

***Grimes-Jenkins v. Consol. Edison Co. of N.Y., Inc.*, No. 16 Civ. 4897 (AT) (JCF), 2017 WL 2258374 (S.D.N.Y. May 22, 2017)**

Employee was a black West Indian woman who had been working for Consolidated Edison Company of New York since 1990. On 6/23/16, she filed a complaint with many claims against employer, including violations of the FMLA. A month later, she requested leave to amend, so she could revise the complaint including characterizing her FMLA claims as unlawful employment practices. Employer opposed the leave to amend on the grounds of futility and undue prejudice, and filed a motion to dismiss. A magistrate judge presided at the hearing.

Employee alleged that in 2014, her supervisor told her colleagues that employee "keeps getting pregnant so that she can get time off the job." The magistrate judge stated that the statute of limitations under the FMLA is two years unless the alleged violation is willful, in which case it is three years. He said none of employee's allegations against employer since 6/23/13 pertained to denial of benefits under the FMLA, willful or otherwise; employee had no viable FMLA interference claim. He added that her supervisor's comment in 2014 that employee "keeps getting pregnant…" did not comprise an adverse employment action, and employee did not allege any other incidents occurring during the statute of limitations period that could be considered adverse employment actions. So employee had no viable FMLA retaliation claims. The judge recommended that employer's motion to dismiss employee's FMLA claims be granted and employee's leave to be amend her FMLA claims be denied.

***Young v. Brennan*, No. 16-12001-FDS, 2017 WL 1843696 (D. Mass. May 8, 2017)**

Employee, a former "transitional" employee for the United States Postal Service, brought suit against the Postmaster General alleging that the Postal Service violated the FMLA by retaliating against her for taking leave. Employer filed a motion to dismiss. The court granted the dismissal on the grounds that the FMLA claim was time barred. The court explained that the FMLA provides a 3 year limitations period for "willful" violations and a two year period for all other violations. Employee's claim had accrued no later than June 2011 when she was informed that her appointment as a transitional employee would not be renewed. Because her complaint was filed more than five years after the accrual (on October 3, 2016), the court dismissed her FMLA claim. Employee had filed an EEOC complaint, but the court held that this did not toll the limitations period.

***Yeger v. Inst. of Culinary Educ., Inc.*, No. 14CV8202-LTS, 2017 WL 377936 (S.D.N.Y. Jan. 25, 2017)**

Employee filed complaint against employer, stating she suffered adverse employment actions by employer, such as salary disparities, diminution of responsibilities and, ultimately, termination, as a result of, among other things, having taken intermittent leave under the FMLA. In 2009 through 2011, employee took leaves of absence for various medical issues (an injury, a surgical procedure, physical therapy). In late 2011, the Institute's office was restructured; employee's job title changed, and the person hired to fill her previous position received a higher salary than she had while in this position. In 2012, employee asked for a raise. In early 2013, employee was placed on a Performance Improvement Plan, which highlighted her failure to meet with the Institute's students and give her supervisors reasonable advance notice of modifications to her work schedule. In July 2013, employee was placed on paid administrative leave. After returning from leave, employee received complaints about her performance similar to those mentioned in her Performance Improvement Plan. In October 2013, she was terminated and sued. Employer filed a motion for summary judgment.

The court first determined that a two-year statute of limitations applied to employee's retaliation claim on the grounds that employee neither disputed the two-year statute nor adduced evidence demonstrating that any decisions made by employer recklessly violated her FMLA rights. The court then held that employee had met her *prima facie* burden (by showing she exercised her rights under the FMLA and suffered adverse employment actions) and that employer had articulated legitimate, non-discriminatory reasons for employee's termination (employee's pattern of deficient performance). The court next evaluated whether employee's pretext argument sufficiently adduced evidence that would permit a reasonable jury to find that the adverse employment actions were motivated at least in part by employee's having taken intermittent leave under the FMLA. Employee first rebutted employer's argument that she did not keep the office apprised of her schedule changes by proffering a handful of emails that she had provided such notice. Employee next demonstrated that employer was concerned about her schedule changes through a series of emails commenting (1) that she was a wildcard with her days off, (2) that she might not have value to the company in two years; (3) that employer was searching for a replacement for employee because it did not believe she would work out in the next three to six months; and (4) that there was a potential high cost of employee's medical insurance expenses for the company. The court found that this evidence supported a reasonable inference that retaliation for employee's medical absences was at least one motivating factor for her termination and denied summary judgment for employer.

Summarized elsewhere:
***Workneh v. Super Shuttle Int'l, Inc.*, No. 15 CIV. 3521 (ER), 2017 WL 6729297 (S.D.N.Y. Dec. 28, 2017)**

***Mejia v. Roma Cleaning, Inc.*, No. 15-cv-4353 (SJF) (GRB), 2017 WL 4233035 (E.D.N.Y. Sept. 25, 2017)**

***Arora v. Henry Ford Health Sys.*, No. 2:15-cv-13137, 2017 WL 4119946 (E.D. Mich. Sept. 18, 2017)**

***McKinley v. Rapid Global Bus. Solutions, Inc.*, No. 1:17-cv-00621-LJM-MJD, 2017 WL 3173058 (S.D. Ind. July 26, 2017)**

***Holladay v. Fairbanks N. Star Borough Sch. Dist.*, No. 4:15-cv-00011-SLG, 2017 WL 2918955 (D. Alaska July 7, 2017)**

***Fox v. Nexteer Auto. Corp.*, No. 16-CV-10462, 2017 WL 2351741 (E.D. Mich. May 31, 2017)**

***Duryea v. MetroCast Cablevision of N.H., LLC*, No. 15-CV-164-LM, 2017 WL 1450219 (D.N.H. Apr. 21, 2017)**

***Moore v. Verizon Wireless (VAW), LLC*, No. 5:14-CV-02230-SGC, 2017 WL 1196959 (N.D. Ala. Mar. 31, 2017)**

***Henderson v. Enters.*, No. 4:15-cv-01522-SGC, 2017 WL 951722 (N.D. Ala. Mar. 10, 2017)**

a. General

***Jackson v. Cnty. of Sacramento Dep't of Health & Human Servs.*, No. 2:16-cv-00920 MCE GGS PS, 2017 WL 4923297 (E.D. Cal. Oct. 31, 2017)**

Employee, a social worker with employer County of Sacramento, brought multiple claims against employer after her termination, including claims under the FMLA. Employer moved to dismiss and the Eastern District Court of California granted the motion. Although the court disagreed with employer that employee did not meet the fairly lenient standards associated with a motion to dismiss, the court nonetheless did dismiss the claim because it was barred by the statute of limitations. The court pointed out that the time of the alleged FMLA breach commences the limitations period, and that any subsequent administrative decisions by employer do not change the accrual period. Because employee's complaint here was filed on May 2, 2016, and the alleged breach occurred on April 22, 2013, the court held that her FMLA was time barred, regardless of whether the alleged violation was ordinary – a two-year statute of limitations – or willful – a three-year statute of limitations.

***Burton v. Jordan Sch. Dist.*, No. 2:15-cv-766 TS, 2017 WL 4022414 (D. Utah Sept. 12, 2017)**

In October 2015, employee sued employer for FMLA violations that allegedly occurred in August 2010. Specifically, employee both requested and was denied FMLA leave in August 2010. In response, employer sought a summary judgment dismissal of employee's claims. Employer argued that employee's claims were time barred by the two-year statute of limitations in the FMLA. In the end, the trial court held that employee's claims were barred by both the

FMLA's general two-year statute of limitations and the FMLA's three-year statute of limitations for "willful" violations. The court calculated the statutes of limitations using the date on which employer denied employee FMLA leave in August 2010.

The court also noted that the FMLA neither contains a provision for tolling the statute of limitations nor addresses the continuing violation doctrine. The continuing violation doctrine is based on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights were violated. Further, the court noted that the Tenth Circuit recognizes equitable tolling of time limitations only if the circumstances of the case rise to the level of active deception. But in employee's case, the court explained that tolling the statute of limitations was not warranted because she knew or should have known that her employment was terminated before October 2012.

***Johnson v. U.S. Postal Serv.*, No. 16-13947, 2017 WL 3977848 (E.D. Mich. Sept. 11, 2017)**

Employee, a United States postal worker, sued employer for FMLA retaliation after he was terminated for excessive unexcused absences. The District Court granted summary judgment for employer on employee's retaliation claim on the ground that it was time-barred. The FMLA provides that a retaliation action must be filed within two years after the date of the last event constituting the alleged violation, and extends the limitations period to three years for willful violations. Because nothing in employee's complaint indicated that he was alleging a willful violation of the FMLA, the limitations period was two years. Employee filed his lawsuit over six months after the two-year limitations period expired.

***Stevenson v. Delta Airlines, Inc.*, 251 F. Supp. 3d 265 (D.D.C. 2017)**

The United States District Court for the District of Columbia heard employer Delta Airlines' motion to dismiss employee's FMLA claims. The court determined that the claims are time barred and granted employer's motion to dismiss. The FMLA requires an employee to file a civil action within two years "after the date of the last event constituting the alleged violation for which the action is brought," or within three years if the action is brought for a "willful violation" of the statute. 29 U.S.C. § 2617(c)(1), (2).

Employee admitted that the last event constituting the alleged violation of the FMLA was her alleged constructive discharge on June 19, 2013. Because employee failed to file her action by June 19, 2016, her claims under the FMLA were untimely and were dismissed.

***Beasley v. Lowe's Home Ctrs., Inc.*, No. CV 15-12665-RGS, 2017 WL 1739172 (D. Mass. May 3, 2017)**

Employee worked for Employer Lowe's Home Centers as a plumbing pro for approximately one year prior to his resignation. During that one-year period, he took FMLA leave. Three years after his resignation and while his discrimination charge was still pending with the state agency, employee filed suit alleging multiple claims, including retaliation under the FMLA. Applying a two-year statute of limitations, the court dismissed employee's FMLA claim on summary judgment.

***Diggs v. Kelly*, No. CV PJM 15-2378, 2017 WL 1104671 (D. Md. Mar. 23, 2017)**

A mail operator for a government agency alleged her doctor recommended surgery for a torn ligament, but employer denied her request for leave under the FMLA in 2006. The statute of limitations began to run in 2006, but she did not file her lawsuit until 2015. The district court of Maryland granted employer's motion to dismiss because the statute of limitations for a violation of the FMLA is two years "after the date of the last event constituting the alleged violation for which the action is brought," unless the violation was willful, in which case the statute of limitations is three years.

Summarized elsewhere:
***Rutherford v. Peoria Pub. Sch. Dist. 150*, 228 F. Supp. 3d 843 (C.D. Ill. 2017)**

***Titus v Miami Dade Cnty.*, No. 16-24000-Civ, 2017 WL 4465785 (S.D. Fla. Sept. 29, 2017)**

***Artis v. Dep't of Corr.*, No. 333815, 2017 WL 4015760 (Mich. App. Sept. 12, 2017)**

b. Willful Violation

***Hollowell v. Kaiser Found Health Plan*, 705 F. App'x 501 (9th Cir. 2017)**

Employee filed an action against his former employer, Kaiser, alleging that employer had interfered with and retaliated against him for exercising his FMLA rights. Employer filed a motion for summary judgment on the ground that employee's claims under the FMLA were time-barred. The district court granted summary judgment in favor of employer and employee appealed. The 9th Circuit Court of Appeals affirmed the district court's ruling, finding that employee's FMLA claims were time barred because he had not demonstrated that employer willfully violated the statute. Employer did not deny employee's request for FMLA leave, but merely asked that he provide it with adequate certification before it would approve his request for leave. Employer was entitled to make this demand and such conduct does not show that employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." Therefore, employee's FMLA claims were properly dismissed.

***Lesser v. Baltimore City Bd. of Sch. Cmm'rs*, No. JKB-17-046, 2017 WL 2733938 (D. Md. June 26, 2017)**

Employee, a student support liaison, brought a class action for interference under the FMLA and an individual action for retaliation under the FMLA against her former employer, Baltimore City Board of School Commissioners. Employee suffered a head injury while employed by employer and needed to undergo surgery. Following the surgery, her physician cleared her to return to work, but employer insisted that employee undergo a psychological fitness-for-duty evaluation by its own medical provider. Based on the results of the evaluation, employer refused to permit employee to return to work and terminated her employment. After employee filed suit, employer contended that employee's FMLA claims should be dismissed because they failed to plead sufficient facts showing that employee's alleged violations were willful. The Maryland District Court disagreed and denied employer's motion to dismiss on two grounds. First, it held that a motion to dismiss was not the proper vehicle for challenging a proposed class. Second, it ruled that employee had adequately alleged facts showing willfulness because rule 9(b) of the Federal Rules of Civil Procedure only required her to plead an employer's mental state generally. Thus, the district court denied employer's motion holding

that employee's failure to state with particularity the circumstances showing willfulness did not render employee's FMLA claims deficient.

***Duryea v. MetroCast Cablevision of N.H., LLC*, No. 15-CV-164-LM, 2017 WL 1450219 (D.N.H. Apr. 21, 2017)**

Former employee asserted claims for retaliation under the FMLA, alleging that employer retaliated against her for taking FMLA leave by giving her lower raises and bonuses in 2011 and 2012 because she took FMLA leave in those years. In both years, employer gave employee the lowest possible rating in the Attendance Category, which measured an employee's annual performance in terms of attendance, punctuality, and time management. Employee claimed that she was given these low ratings because of time she took off from work including FMLA-protected absences, and that her resulting raises and bonuses in 2011 and 2012 were lower than they would have been if she had not taken FMLA leave.

The court made this determination on employer's motion for summary judgment. Employer argued that employee's FMLA claim was barred by the FMLA's statute of limitations and the court agreed. A person alleging violation of the FMLA must bring a claim within two years from the date of the alleged violation, with a three-year statute for allegations of willful violation of the FMLA. Employee filed her complaint more than three years after she received her 2011 raise and bonus, but only two years and four months after she received her 2012 raise and bonus. Thus, while employee's 2011 claim was time-barred, her 2012 claim would be permitted to move forward if employee could show a willful violation.

The court found that there was no evidence in the record that employer either knew or showed reckless disregard for whether its conduct was prohibited by the statute. The only evidence employee provided was a single comment from employee's supervisor that she lost points in the Attendance Category because she had taken time off from work, which employee argues May have included both her paid and unpaid absences. The court explained that to establish a willful violation of the FMLA, employee must do more than speculate that employer May have considered FMLA leave as part of her rating in the Attendance Category; she must show that employer knew it would violate the FMLA, or that employer recklessly disregarded employee's FMLA rights when it gave employee her rating in the Attendance Category. Employee's raise was only slightly lower than company standard and her bonus was just slightly below the highest bonus she was eligible to receive, therefore no reasonable jury could find that employer willfully violated employee's FMLA rights when it calculated her raise and bonus in 2012. The court concluded that employee's claim was thus time-barred by a two-year statute of limitations, and granted summary judgment on behalf of employer.

***Jackson v. Cnty. of Sacramento Dep't of Health & Human Servs.*, No. 2:16-CV-0920 MCE GGH PS, 2017 WL 1375211 (E.D. Cal. Apr. 17, 2017)**

Employee, a *pro se litigant* proceeding *in forma pauperis*, brought suit against her former employer and two individual defendants for numerous claims, including violation of the FMLA. Employee began her employment in 2005. She was approved for an FMLA leave from March 8 through June 9, 2013 to address her mother's need for care. In her complaint, employee explained that the leave was necessitated by the fact that the cost of her mother's continuing care in an assisted living facility was about to be raised and employee needed to acquire funds to permit her to move her mother to another facility. On April 22, 2013, employer notified

employee that her leave was terminated and she was placed on administrative leave while employer investigated suspected improper use of FMLA benefits.

Defendants filed a motion to dismiss all of employee's claims. The district court in California found that employee's claim for violation of the FMLA both failed to state a claim and was barred by the applicable statute of limitations. As a result, it dismissed those claims with leave to amend in accordance with the authority cited in the defendants' motion to dismiss. The district court acknowledged that both employer entity and individuals pertinent to the claim May be sued under the FMLA and that the claim would not be barred by the statute of limitations if employee pled a willful violation.

***Artis v. Dep't of Corr., No. 333815*, 2017 WL 4015760 (Mich. App. Sept. 12, 2017)**

On July 1, 2015, employee sued employer for FMLA violations that allegedly occurred on June 28, 2012. In response, employer filed a motion for summary judgment seeking a dismissal based on the FMLA's two-year statute of limitations. In opposition to the summary judgment, employee sought to apply the "willful" exception to the FMLA, which extended the statute of limitations to three years.

On appeal, the court affirmed the trial court's summary judgment. The state appellate court noted that the United States Supreme Court defined "willful" as conduct occurring when the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute. The court further noted that the standard required more than mere negligence. And, an employer's general knowledge about the statute's potential applicability, by itself, did not show willfulness.

Although employee called-in to her supervisor, she did not give an estimate of how many days she would be absent. That is, employer did not know whether employee's absence would last longer than a single day. Therefore, employer's knowledge of the FMLA, along with employee's hospitalization, was insufficient to show that employer acted "willfully," especially when employee did not say whether she would be absent for longer than a single day. In the end, employee's claim was based on nothing more than that employer knew about the FMLA.

Summarized elsewhere:
***Workneh v. Super Shuttle Int'l, Inc.*, No. 15 CIV. 3521 (ER), 2017 WL 6729297 (S.D.N.Y. Dec. 28, 2017)**

***Mejia v. Roma Cleaning, Inc.*, No. 15-cv-4353 (SJF) (GRB), 2017 WL 4233035 (E.D.N.Y. Sept. 25, 2017)**

***Johnson v. U.S. Postal Serv.*, No. 16-13947, 2017 WL 3977848 (E.D. Mich. Sept. 11, 2017)**

***Stevenson v. Delta Airlines, Inc.*, 251 F. Supp. 3d 265 (D.D.C. 2017)**

***Henderson v. Enters.*, No. 4:15-cv-01522-SGC, 2017 WL 951722 (N.D. Ala. Mar. 10, 2017)**

2. Sovereign Immunity

***Keselyak v. Curators of Univ. of Mo*, 695 F. App'x 165 (8th Cir. 2017)**

Employee, a tenured professor at the University of Missouri Kansas City School of Dentistry, brought suit against her former employer alleging that the employer violated her FMLA rights by suspending her salary when she was unable to return to work following an injury and failed to request FMLA leave. The district court granted the employer's motion to dismiss on sovereign immunity grounds. Employee appealed, and in a summary *per curiam* opinion, the court of appeals affirmed.

***Minnis v. State of Wash.*, 675 F. App'x 728 (9th Cir. 2017)**

This case involves the affirmance of a summary judgment motion for FMLA and other claims brought by a state employee. The trial court granted summary judgment, and summary judgment was affirmed on her FMLA and ADA claims because the state is immune from suit under the Eleventh Amendment.

***Garza v. Tex. Dep't of Aging & Disability Servs.*, No. A-17-CA-686-SS, 2017 WL 4681799 (W.D. Tex. Oct. 17, 2017)**

Employee sued employer Texas public entity for interference and retaliation theories under the FMLA in state court. Employer removed employee's case to federal court, citing federal question jurisdiction. Employer filed a motion to dismiss for lack of subject matter jurisdiction and motion for judgment on the pleadings pursuant to, respectively, Fed. R. Civ. P. 12(b)(1) and 12(c) on grounds of sovereign immunity.

Texas recognizes two forms of sovereign immunity, the first of which is immunity from suit and the other immunity from liability. Because the public entity removed employee's suit to federal court, it waived the right to argue that it was immune from suit. Its motion to dismiss for lack of subject matter jurisdiction was therefore denied.

The court, however, granted employer's motion for judgment on the pleadings. Citing the fact that sovereign immunity based on liability is governed by state law, the court relied on state court rulings holding that Texas had no waived its sovereign immunity to FMLA's self-care provisions. Based on these rulings, the court dismissed employee's FMLA claims on sovereign immunity grounds.

***Boulware v. S.C. Dep't of Health & Human Servs.*, No. 3:17-01110-MGL, 2017 WL 4401673 (D.S.C. Oct. 4, 2017)**

Employee filed suit against her employer, a state agency, alleging both self-care and family-care claims of interference with the FMLA, together with common law claims. Employer moved to dismiss. The court dismissed employee's FMLA claims with prejudice and dismissed the state law claims without prejudice, declining to exercise supplemental jurisdiction over them.

As to employee's self-care claim, the court followed the Supreme Court case of *Coleman v. Court of Appeals of Md.*, 566 U.S. 30 (2012), which held that the Eleventh Amendment bars self-care claims against the states.

As to employee's family care claim, the court found that the complaint failed to state a factual and legal claim under the FMLA because none of the actions alleged by employee – scheduling a meeting during a protected doctor's appointment, informing employee others could do her job or were a better fit, and extending her probationary period – were remediable under the FMLA.

***Cruz v. Tex. Health & Human Servs. Comm'n*, No. 1:16-cv-072, 2017 WL 3605234 (S.D. Tex. Aug. 22, 2017)**

Employee, a former employee of the Texas Health and Human Services Commission, sued her former employer alleging claims related to the circumstances surrounding her retirement, including a claim for FMLA retaliation. Employer moved for summary judgment on employee's FMLA claim on the ground that it was barred by the doctrine of sovereign immunity, and the court granted the motion.

The court held that sovereign immunity barred the claim because employer was an agency of the State of Texas, and employee sought monetary damages under a self-care provision. Employee argued that the *Ex Parte Young* exception applied, saving part of her claim, because in addition to monetary damages she sought injunctive relief in the form of reinstatement. However, the court rejected that argument because employee brought her claim against the state agency itself, rather than an individual acting in his official capacity, and employee did not plead for injunctive relief in the form of reinstatement for FMLA violations.

***McKay v. Med. Univ. of S.C.*, No. 2:17-45-RMG, 2017 WL 3477799 (D.S.C. Aug. 14, 2017)**

Employee worked for employer, Medical University of South Carolina, and brought suit alleging FMLA interference and retaliation claims under the "self-care" provisions of the FMLA. Employee contended she was retaliated against for taking FMLA leave due to struggles with epilepsy. A South Carolina District Court dismissed employee's interference claim stating that she failed to satisfy a required element of the claim by not showing that her employer denied an FMLA benefit to which she was entitled, such as showing that she was denied requested leave, forced to structure her FMLA requests differently, or that FMLA violations caused her to lose compensation or benefits. Ultimately, the court gave employee an opportunity to amend her complaint and cure the defect with her interference claim, if she is able.

Employee also pursued claims against two hospital employees, arguing that they bullied and ridiculed her, did not properly process her FMLA leave requests, did not properly secure her HIPAA-protected information, and made improper internal disciplinary allegations about her. The court disagreed that those actions would fall outside employees' duties as state officials. The court explained that controlling Fourth Circuit authority holds that claims against state employees in their individual capacities under the FMLA are barred by Eleventh Amendment immunity when the state is the real party in interest. While workplace bullying and ridicule, standing alone, are not FMLA violations, anything that either employee did to interfere with employee's exercise of her right to FMLA leave was inextricably tied inextricably to their official duties.

***Schuman v. Perry*, No. 16-CV-313-JED-FHM, 2017 WL 2951918 (N.D. Okla. July 10, 2017)**

Employee sued her former employer, a federal agency, for allegedly violating the FMLA. The district court, however, dismissed employee's FMLA claims. The court explained that the

FMLA was enacted under two titles. Title I governs leave for both private employees and federal employees who are not covered by Title II. Title II covers most civil service employees who perform a federal function. Such employees must also have completed at least 12 months of service and be supervised by another appointed employee. Employee alleged that she was a Title II employee in her complaint. But, while Title I and Title II employees are afforded equal rights to the family and medical leave, only Title I authorizes a private right of action. That is, the United States did not waive sovereign immunity for FMLA claims by Title II employees. The court thus dismissed employee's FMLA claim based on sovereign immunity.

***McCarty v. Purdue Univ. Bd. of Trs.*, No. 4:13 CV 54, 2017 WL 2784413 (N.D. Ind. June 27, 2017)**

Employee university employee claimed that employer, a public university, interfered with his FMLA right to be restored to his pre-leave position or its equivalent. Employee had applied for and his employer had certified continuous and intermittent leave for a one-year period, from October 15, 2012 through October 14, 2013. Within that one-year period, employee took continuous FMLA leave for eleven days following the birth of his child. The day after he returned from his continuous 11-day leave, his employer informed him he would not retain the position he held prior to this period of leave. Employee asserted the change in position was a demotion. Employer moved to dismiss, asserting that the leave employee took immediately prior to the alleged demotion was self-care leave, as opposed to family care leave, and therefore Eleventh Amendment sovereign immunity precluded employee's FMLA claim.

In denying the motion to dismiss, the court reasoned that, although employee was absent for multiple separate periods during the one-year period of intermittent leave, the entire span of intermittent leave counted as one block of FMLA leave. Since employee had presented evidence demonstrating he was demoted before his year-long intermittent family leave ended, he had presented competent proof to support an interference claim based on family leave, as opposed to self-care leave, defeating employer's Eleventh Amendment immunity argument.

Employer also moved to dismiss two individual defendants, asserting that employee had not alleged they violated the FMLA outside of their official capacities. The court denied the motion as to the individual capacity claims noting that one court had found that a public employee May be held individual liable under the FMLA if employee acts directly or indirectly in the interest of employer, and because the court had previously denied summary judgment on the same individual capacity claims and employer made no argument that anything had changed regarding those claims.

***Ndzerre v. Wash. Metro. Area Transit Auth.*, No. 17-90 (RJL), 2017 WL 2692609 (D.D.C. June 21, 2017)**

Employee was an automatic train control mechanic for the Washington Metropolitan Area Transit Authority, an interstate compact agency created by Congress. Employee alleged that his employer violated his rights under the FMLA on two occasions. First, employee alleged employer unlawfully denied his request for FMLA leave in November, 2015, after he had undergone outpatient surgery for ongoing gastrointestinal bleeding, gastroesophageal reflux disease, and hemorrhoids, on the grounds that his condition did not qualify as a serious medical condition and that no medical condition was indicated on his FMLA certification. Second,

employee alleged that his employer failed to respond to a second application for FMLA leave and proper FMLA notice in July of 2016 and ultimately denied him leave.

The district court granted employer's motion to dismiss on the ground of Eleventh Amendment immunity. The court noted that courts in the District of Columbia Circuit had consistently recognized that the transit authority enjoyed Eleventh Amendment immunity from suit in federal court to the same extent as a state, based on its performance of governmental functions, and that employer's "governmental function" immunity encompassed hiring, training, and supervision of employer's personnel, which was the kind of conduct for which employee was seeking to hold employer liable. Since employee's complaint alleged he sought FMLA leave for his own medical condition, employee's requests fell under the self-care provision of the statute, and the Eleventh Amendment barred his claim.

***Crawford v. Ga. Dep't of Transp. (GDOT)*, No. 1:16-CV-3810-WSD, 2017 WL 1405326 (N.D. Ga. Apr. 20, 2017)**

Employee brought suit against her former employer, the Georgia Department of Transportation. Employer removed the suit to federal court and moved to dismiss employee's FMLA claims under the self-care provisions of the Leave Act, 29 U.S.C. § 2612(a)(1)(D). The motion to dismiss was considered by the magistrate judge and submitted to the district court for review. Employer objected to the magistrate judge's report and recommendation arguing that the court should grant its motion to dismiss on the grounds of Eleventh Amendment immunity.

Employer, as an arm of the State of Georgia, is ordinarily protected by the Eleventh Amendment from claims under the self-care provisions of the FMLA. Because employer voluntarily removed this action to federal court, however, the court considered whether employer waived its Eleventh Amendment immunity.

The district court in Georgia found that Article I of the Georgia Constitution extends sovereign immunity to the state and all of its departments and agencies and that the immunity can only be waived by an Act of the Georgia legislature that specifically provides for and describes the extent of the waiver. The district court further found that the two Georgia statutes that specifically waive sovereign immunity do not apply to a claim under the self-care provisions of the FMLA. As such, the court granted employer's motion to dismiss employee's FMLA claims despite its removal of the case to federal court.

***Hibben v. Okla. ex rel. Dep't of Veterans Affairs*, No. 16-CV-111-TLW, 2017 WL 1239146 (N.D. Okla. Mar. 31, 2017)**

Employee, a former employee of the Oklahoma Department of Veterans Affairs, filed suit against her former employer and former supervisor for interference and retaliation under the FMLA. Employee applied for and was granted intermittent leave due to medical and mental health issues. She returned to work six days later and alleges that she was retaliated against.

Defendants filed a motion to dismiss employee's FMLA claims based on a claim of qualified immunity. As a preliminary matter, the district court in Oklahoma acknowledged that there was a circuit split on the question of whether individual public employees satisfy the definition of "employer" in the FMLA. Defendants argued that employee had not shown it was clearly established law that an individual supervisor could be held liable as an employer under the FMLA.

The district court ruled that defendants' motion to dismiss based on qualified immunity failed because the right the public official allegedly violated was clearly established even though it was arguably unclear whether individual liability would ultimately attach. However, the district court dismissed employee's retaliation claim because none of the facts alleged suggested that employee was prevented from taking her full leave, was denied initial permission to take leave, or denied reinstatement.

***Mack v. Herty Advanced Materials Dev. Ctr.*, No. CV415-196, 2017 WL 1102599 (S.D. Ga. Mar. 22, 2017)**

Employee brought suit against her employer under 29 U.S.C. §§ 2601-2654 for the termination of her employment while she was out on FMLA leave. A separate entity filed an answer to employee's complaint and the Board of Regents of the University System of Georgia filed a motion to dismiss alleging it was the successor to and continuation of employer. The Board argued that the complaint should be dismissed for improper service. The court dismissed this motion because the Board failed to file either a motion to intervene or a motion to substitute party. The Board then filed a motion to intervene and a renewed motion to dismiss. In its motion to dismiss, the Board argued it was not properly served, the complaint failed to state a claim upon which relief May be granted, and employee's FMLA claims were barred by the Eleventh Amendment and applicable statute of limitations.

Recognizing that the Eleventh Amendment could preclude any FMLA claims, the court expressed concern as to the relationship of the parties in the case. The court reasoned two entities shared employer's name; one an LLC and one overseen by the Board. Further, none of the parties sufficiently explained the employment relationship between employee and the various entities of employer. Therefore, the court ordered employers to file a brief within thirty days of the date of the order explaining which entity employed employee and how all of employers were interrelated. Finally, the court held once employee's true employer was determined, the court would rule on the pending motion to dismiss.

***Cheatham v. Augusta-Richmond Cnty. Ga.*, No. CV 116-104, 2017 WL 78569 (S.D. Ga. Jan. 9, 2017)**

Employee, a communications officer at a 911 call center, brought suit alleging that her employer, the City of Augusta, Georgia, violated the FMLA when it took adverse action against her after she took leave to undergo medically necessary surgery. Employer moved to dismiss the claim, arguing that Eleventh Amendment sovereign immunity barred the application of the FMLA. A Georgia district court denied employer's motion to dismiss. In arguing that it was protected from suit by the Eleventh Amendment, employer relied on the Supreme Court's decision in *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30 (2012). However, the court noted that in *Coleman*, the Supreme Court had only declared that *states* are immune from suit for monetary damages under the FMLA's self-care provision. The Supreme Court did not hold that counties, municipalities, and lesser government entities were also immune from suit for monetary damages under the FMLA's self-care provision. Rather, the court noted that the Supreme Court has consistently declared that sovereign immunity does not extend to units of local government. Thus, the court found that the City did not enjoy the protections of Eleventh Amendment immunity because it is a unit of local government and not an arm of the state.

Summarized elsewhere:
<u>*Cordova v State of N.M.*, No. 16-CV-1144-JAP-JHR, __ F. Supp. 3d __, 2017 WL 4480748 (D.N.M. Oct. 6, 2017)</u>

<u>*Colter v. Bowling Green-Warren Cnty. Reg'l Airport Bd.*, No. 1:17-CV-00118-JHM, 2017 WL 5490920 (W.D. Ky. Nov. 15, 2017)</u>

<u>*Cruthirds v. Lacey*, No. 5:14-CV-00260-BR, 2017 WL 2242868 (E.D.N.C. May 22, 2017)</u>

<u>*Doucette v. Johnson*, No. CV 16-11809, 2017 WL 840406 (E.D. Mich. Mar. 3, 2017)</u>

3. Waiver

Summarized elsewhere:
<u>*Zisumbo v. Convergys Corp.*, No. 1:14-CV-134-RJS, 2017 WL 5634120 (D. Utah Nov. 22, 2017)</u>

4. *Res Judicata* and Collateral Estoppel

Summarized elsewhere:
<u>*Smith-Megote v. Craig Hosp*, 229 F. Supp. 3d 1224 (D. Colo. 2017)</u>

<u>*Sewell v. Strayer Univ.*, No. CV PWG-16-159, 2017 WL 57212 (D. Md. Jan. 5, 2017)</u>

5. Equitable Estoppel as a Bar to Certain Defenses

<u>*Scott v. ProClaim Am., Inc.*, No. 14-CV-6003 (DRH) (ARL), 2017 WL 1208437 (E.D.N.Y. Mar. 31, 2017)</u>

ProClaim is a third-party administrator that provides claims services to the United States healthcare industry. In 2010, ESIS, a member of the ACE Group, acquired a majority share of the stock of ProClaim. While ProClaim now does business under the name "ESIS ProClaim," ESIS and ProClaim are separate corporate entities. ProClaim does not share employees with ACE or ESIS; neither ACE nor ESIS plays a role in ProClaim's personnel decisions. Furthermore, ProClaim has its own Human Resources department, separate from that at ESIS.

Employee commenced work as an adjuster at ProClaim in December 2005, working there until December 2013. In 2013, employee suffered a concussion outside work, after which he had several medical issues and missed a day of work. A week later, he failed to deliver a hospital report on time and received a warning from his supervisor, Carl Ferdenzi (also a defendant in this case). Prior to December 26, 2013, employee never submitted any documentation from any health care provider regarding any need for time off from work. On this date, he submitted a letter from his doctor explaining that he was suffering from post-concussion syndrome and had been advised not to work. On December 30, 2013, after he had been out of work for 10 days, Human Resources approved his FMLA leave. In January 2014, upset by the warning he had received from Ferdenzi, employee spoke on the phone with Heather Roy of Human Resources and expressed his desire to resign. Roy replied, "the decision has been made to terminate your employment."

Employee brought suit against ProClaim, ESIS, ACE, and individual defendant Fredenzi. ProClaim moved for summary judgment, arguing that employee was not eligible for FMLA leave because, as his direct employer, it did not employ 50 employees within 75 miles of employee's worksite and that its relationship with ESIS and ACE was not sufficient to support a single-employer theory that would permit for the employees of the three entities to be aggregated toward the 50 employee count. The court held that employee's joint employer argument failed because his evidence of the interrelationship among the three defendants was insufficient: (1) that employee occasionally provided work for ACE was unavailing because in that case ACE was a customer of ProClaim; and (2) that ACE and ProClaim shared a policy was insufficient without more. Instead, the court found important that (1) the absence of any evidence that ACE and ESIS reviewed applications for employment at ProClaim or approved personnel status reports or major employment decisions for ProClaim; (2) employee conceded that neither entity played a role in his FMLA leave; (3) the absence of any evidence that ACE or ESIS played any role in the employment of employee or any other employee of ProClaim; and (4) the absence of evidence as to the number of employees either ACE or ESIS employed within 75 miles of employee's worksite. On employee's estoppel claim, the court found that, because ProClaim had approved his FMLA leave, ProClaim (but not ESIS or ACE) was estopped from denying his eligibility. Holding that employee stated a *prima facie* case against ProClaim, the court analyzed ProClaim's legitimate business reason for the adverse employment action and employee's evidence of pretext. It agreed with employee that a jury could find pretextual ProClaim's argument that there was no adverse employment action because employee resigned and was not terminated, given that ProClaim said to employee that the decision had been made to terminate him. On this basis, the court denied summary judgment as to ProClaim.

With respect to employee's claim that Ferdenzi also was his employer, the court denied summary judgment for Ferdenzi because there was sufficient evidence to support such a relationship in that Ferdenzi: (1) hired employee; (2) had some control over the conditions of employee's employment; and (3) had the power to terminate employee.

Summarized elsewhere:

***Brooks v. Prospect of Orlando, Ltd.*, No. 3:16-CV-1089-J-34JBT, 2017 WL 6319552 (M.D. Fla. Dec. 11, 2017)**

***Griffin v. Don E. Bower, Inc.*, No. 3:16-2412, 2017 WL 4310091 (M.D. Pa. Sept. 28, 2017)**

***Burton v. Jordan Sch. Dist.*, No. 2:15-cv-766 TS, 2017 WL 4022414 (D. Utah Sept. 12, 2017)**

***Boles v. Spanish Oaks Hospice, Inc.*, No. CV416-323, 2017 WL 2222443 (S.D. Ga. May 19, 2017)**

***Riley v. City of Kokomo*, No. 1:15-CV-391-WTL-DML, 2017 WL 897281 (S.D. Ind. Mar. 7, 2017)**